No. 15515

United States
Court of Appeals
for the Ninth Circuit

RALPH B. DEFENBACH, as Trustee,
Appellant,

vs.

R. MAX ETTER and PAUL C. KEETON,
Appellees.

Transcript of Record

Appeal from the United States District Court for the Eastern District of Washington, Northern Division

FILED
JUN 17 1957
PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—6-12-57

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Transcript of Proceedings—(Continued):

Witnesses:

NAMES AND ADDRESSES OF ATTORNEYS

FRANCIS J. McKEVITT,
JOSEPH L. THOMAS,
HART SNYDER,

711 Old National Bank Building,
Spokane, Washington,

Attorneys for Petitioners-Appellees.

THOMAS MALOTT,

708 Spokane and Eastern Building,
Spokane, Washington,

Attorney for Defendant-Appellant.

In the United States District Court, Eastern District of Washington, Northern Division

Civil Action No. 1308

THE MACCABEES, a fraternal benefit society, Plaintiff,

vs.

MARY P. WEYEN, individually, and as guardian of Daryl Weyen and Carolyn Weyen, Minors; RALPH B. DEFENBACH as Trustee; E. J. STANFILL as Trustee and E. J. STANFILL as Executor of the Estate of Robert Francis Weyen, Deceased, Defendants.

STIPULATION

The parties defendant in this cause, being represented by respective counsel, R. Max Etter and S. Dean Arnold, do hereby stipulate as follows:

Whereas, there has heretofore been filed in this cause a Motion for Summary Judgment by defendant, Ralph B. Defenbach, based upon the opinion of the United States District Court in the case of Sun Life Assurance Company v. Weyen, et al., No. 309 of the records of the Clerk of the United States District Court; and

Whereas, it appears that the case of Sun Life Assurance Company v. Weyen, heretofore mentioned, is now on appeal and is being appealed to the Court of Appeals for the Ninth Circuit; and

Whereas, it appears that the disposition of said appeal by the Court of Appeals for the Ninth Cir-

cuit will be dispositive of the issues in the present cause;

It is, therefore, hereby stipulated between R. Max Etter and S. Dean Arnold, as follows:

I.

Plaintiff, The Maccabees, in the above-entitled cause, shall be under no further obligation to participate in said matter [1]* and cause, and counsel for said The Maccabees, to-wit, Graves, Kizer, Greenough & Gaiser, shall be entitled to attorneys' fees and costs in the sum of $265.78 to be disbursed by the Clerk of the Court.

II.

The decision or order of the Court on defendant Defenbach's Motion for Summary Judgment shall be withheld pending decision by the Court of Appeals for the Ninth Circuit, in the case of Sun Life Assurance Company v. Weyen, after which the Court shall rule on said Motion for Summary Judgment, and the disposition of funds involved in the instant cause.

III.

Honorable Stanley D. Taylor, Clerk of the United States District Court, in his personal capacity, and acting for all of the parties, may receive from the Clerk of the Court, the sum of $5,731.49, being the total amount deposited in this said action by plaintiff, and the said Stanley D. Taylor shall be authorized, and is so authorized by this stipulation

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* Page numbers appearing at foot of page of original Transcript of Record.

to deposit the same with the Fidelity Savings & Loan Association of Spokane, Washington, until such time that said money may be disbursed upon order of this Court.

Dated this 16th day of April, 1956.

/s/ R. MAX ETTER,
/s/ PAUL C. KEETON,
Attorneys for Ralph B. Defenbach.
/s/ S. DEAN ARNOLD.

Approved May 2, 1956.

/s/ SAM M. DRIVER,
United States District Judge. [2]

[Endorsed]: Filed April 27, 1956.

[Title of District Court and Cause No. 1308.]

ORDER

It appearing that defendants in the above entitled cause have entered into a stipulation in respect to disposition of the above entitled cause, it is

Ordered that the Clerk of this Court disburse and pay to counsel for plaintiff, Graves, Kizer, Greenough & Gaiser, the sum of $265.78, as and for reasonable fee and costs of plaintiff in the above entitled action, and said amount shall be withdrawn from funds deposited in this cause by said plaintiff, and the Clerk is authorized to draw a check in favor of said counsel, and counsel are further dismissed and excused from any participation in said cause;

And It Is Further Ordered that the stipulation on file be approved in accord with its terms.

Dated this 2nd day of May, 1956.

/s/ SAM M. DRIVER,
Judge of the U. S. District Court.

Approved:
/s/ S. DEAN ARNOLD.
/s/ R. MAX ETTER. [3]

[Endorsed]: Filed May 2, 1956.

In the United States District Court, Eastern District of Washington, Northern Division

Civil No. 1309

SUN LIFE ASSURANCE COMPANY OF CANADA, a corporation, Plaintiff,

vs.

MARY P. WEYEN, individually and as guardian of Daryl Weyen and Carolyn Weyen, minors, ELFRIEDA MAY, RALPH D. DEFENBACH, as Trustee, E. J. STANFILL, as Trustee and E. J. STANFILL, as Executor of the Estate of Robert Francis Weyen, Deceased, Defendants.

NOTICE OF LIEN AS TO ABOVE NUMBERED ACTION and CIVIL No. 1308

To Ralph B. Defenbach, as Trustee:

You Are Hereby Notified that the undersigned have and claim a lien upon that certain Judgment

and check in payment of said Judgment, and now in the possession of R. Max Etter, attorney at law, Spokane, Washington, which is in the total of $60,302.94, in the amount of $16,500.00 for attorneys' fees and costs of action and personal expenses in the above entitled action, and in a companion action entitled: "The Maccabees, a fraternal benefit society, Plaintiff, vs. Mary P. Weyen, et al., Defendants, bearing Civil No. 1308.

The legal services were rendered on your behalf on and in the above entitled cause and said companion action No. 1308 during the period from May, 1955, to June 7th, 1956.

Dated at Spokane, Washington, this 20th day of June, 1956.

/s/ R. MAX ETTER.
/s/ PAUL C. KEETON. [4]

[Endorsed]: Filed June 20, 1956.

[Title of District Court and Cause No. 1309.]

NOTICE OF LIEN AS TO ABOVE NUMBERED ACTION and CIVIL No. 1308

To Ralph B. Defenbach, as Trustee:

You Are Hereby Notified that the undersigned have and claim a lien upon that certain Judgment and check in payment of said Judgment, and now in the possession of R. Max Etter, attorney at law, Spokane, Washington, which is in the total of $60,302.94, in the amount of $16,500.00 for attorneys' fees and costs of action and personal expenses

in the above entitled action, and in a companion action entitled: "The Maccabees, a fraternal benefit society, Plaintiff, vs. Mary P. Weyen, et al., Defendants, bearing Civil No. 1308.

The legal services were rendered on your behalf on and in the above entitled cause and said companion action No. 1308 during the period from May, 1955, to June 7th, 1956.

Dated at Spokane, Washington, this 20th day of June, 1956.

/s/ R. MAX ETTER.
/s/ PAUL C. KEETON. [5]

[Endorsed]: Filed June 20, 1956.

[Title of District Court and Cause No. 1309.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause coming on duly and regularly for trial on Tuesday, the 18th day of October, 1955, at 10 o'clock a.m., in the court rooms of the above entitled court at Spokane, Washington, before the Honorable Sam M. Driver, judge of the above entitled court, the plaintiff was represented by the law firm of Graves, Kizer, Greenough & Gaiser of Spokane, Washington; and the defendant Mary P. Weyen, individually and as guardian of Daryl Weyen and Carolyn Weyen, minors, was represented by S. Dean Arnold of Clarkston, Washington; the defendant Elfrieda May was represented by C. C. Rowan of Spokane, Washington

he defendant Ralph B. Defenbach as trustee was epresented by Paul C. Keeton of Lewiston, Idaho, nd R. Max Etter of Spokane, Washington; and he defendant E. J. Stanfill as trustee and E. J. Stanfill as executor of the estate of Robert Francis Weyen, deceased, was represented by S. Dean Arnold of Clarkston, Washington. All of the attorneys for the respective parties were present in ourt; and Elfrieda May, Ralph B. Defenbach [6] nd E. J. Stanfill appeared personally.

All parties having announced their readiness to proceed with the trial, the Court heard testimony f witnesses called by both the plaintiff and the lefendants and examined documentary evidence resented by the parties, and having heard oral rguments by the attorneys for the defendants at he conclusion of the trial and they having been llowed sufficient time for the submission of briefs y all parties, and the Court having been fully adised in the premises now makes it

Findings of Fact

The Court finds:

I.

That this Court has jurisdiction of said cause and ll of the parties thereto on account of Sec. 2361 f the United States Code which provides for interpleading causes of action, one of which is cases nvolving life insurance policies as in the case at ar; that in accordance with the interpleader statte, the plaintiff Sun Life Assurance Company of anada, a corporation, has deposited in the regis-

try of the court the net proceeds of eight life in surance policies on the life of Robert F. Weyen who died accidentally on April 16, 1955; the de fendants, being rival claimants to the proceeds o the policies, they have been impleaded as defend ants.

II.

That the policies interpleaded in this action b the Sun Life Assurance Company of Canada, corporation, plaintiff, are as follows: No. 1 447 698 No. 1 852 251; No. 1 952 847; No. 1 710 519; No 1 919 863; No. 1 755 413; No. 1 861 701 and No 1 861 700. [7]

III.

That on September 22, 1953, Robert F. Weye was a resident of Asotin County, state of Wash ington, and secured a decree of divorce in the Su perior Court of that county from his wife, Mar P. Weyen; that Mary P. Weyen was awarded cus tody of the two minor children of the parties namely, Daryl Weyen and Carolyn Weyen. Tha as a part of the divorce proceedings, Robert F Weyen was required to pay Two Hundred ($200.00 Dollars per month for the support of said mino children during their minority; and the insuranc policies in suit, in accordance with the Propert Settlement Agreement entered into between th parties, were awarded to the insured, Robert F Weyen.

IV.

That on September 23, 1953, Robert F. Weye executed a trust agreement, or declaration of trus

n which he named his attorney, the defendant E. . Stanfill, as trustee, and stated that he had des-gnated the trustee as beneficiary of ten life insur-nce policies, seven of which policies are involved n the present action, three being issued by insur-nce companies other than the plaintiff. The poli-ies constituted the corpus of the trust. The trust vas to continue for a period of fifteen years and he beneficiaries were the two minor children of Robert F. Weyen. The trust agreement provided hat in case of the death of Robert F. Weyen dur-ng the trust period, the trustee should collect the roceeds of the life insurance policies and use them or the education, maintenance and support of the hinor children. The trust agreement contained the ollowing provision:

"The donor specifically reserves the right, during he term of this trust, to pledge any of such poli-ies as collateral or to exercise the loan rights as rovided in said policies, and in the event the onor makes application for such loans, it is hereby xpressly understood that the signature of the rustee herein named shall not be required to join n the application for said loans." [8]

V.

That on September 23, 1953, Robert F. Weyen xecuted a Last Will and Testament, in which he tated that he had made no provision for his minor hildren because, "I have heretofore provided for hem through insurance policies on my life; how-ver, should said policies lapse or become null and

void, I hereby give, and devise and bequeath to my said children the sum of $10,000.00, share and share alike."

VI.

That prior to November 16, 1954, Robert F Weyen had become involved in financial difficulties and was unable to pay his debts; and that on November 16, 1954, he executed an assignment to Ralph B. Defenbach as trustee for the benefit of his creditors. In that document he assigned all his property, assets and income to Ralph B. Defenbach as trustee for his creditors. Certain real property and a number of items of personal property were particularly described in the assignment and said assignment included all *by* one of the life insurance policies which are the subject of the present action. The policies assigned to Ralph B Defenbach as trustee are as follows:

1 852 251	Sun Life Assurance Co. of Canada	$ 2,00
1 952 847	Sun Life Assurance Co. of Canada	5,00
1 710 519	Sun Life Assurance Co. of Canada	1,00
1 919 863	Sun Life Assurance Co. of Canada	3,00
1 755 413	Sun Life Assurance Co. of Canada	1,00
1 861 701	Sun Life Assurance Co. of Canada	10,00
1 861 700	Sun Life Assurance Co. of Canada	10,00

Pursuant to the assignment to the defendant Defenbach, the necessary documents were prepared and the assignor delivered the policies to Defenbach for forwarding to the home offices of the companies issuing said policies so that appropriate endorsements might be attached thereto showing Defenbach as beneficiary thereunder. In this manner sai

policies were [9] pledged to defendant Ralph B. Defenbach as trustee for the creditors of Robert F. Weyen.

VII.

By its terms the Stanfill Trust specifically reserved a right to the donor, Robert F. Weyen, to exercise the loan rights as provided in the policies of insurance and "to pledge any of such policies as collateral"; that this trust agreement was drafted by a lawyer and the right to pledge as collateral reserved to the donor a means of putting up the policies as security for a debt additional to the personal obligation of the debtor. The right reserved to pledge the insurance policies as collateral applied to security for the payment of debts, whether they be antecedent or newly created.

VIII.

When Robert F. Weyen got into serious financial difficulties in November of 1954, he took advantage of the reservation he had made in his declaration of trust and did pledge the life insurance policies as collateral security for the payment of his debts. It was not necessary for him to change the beneficiary in order to accomplish that purpose; that in executing the Assignment to Trustee for Benefit of Creditors dated November 16, 1954, Robert F. Weyen intended to pledge his assets including his life insurance as security for the payment of his debts.

IX.

That the Court finds that prior to the time of

the execution of the Assignment to Trustee for Benefit of Creditors on November 16, 1954, Robert F. Weyen had assigned to the defendant Elfrieda May policy No. 1 447 698, to which policy no claim is made by the defendant Defenbach; [10] that during the trial of said cause, the defendant Elfrieda May did not contest the right of the minor children Daryl Weyen and Carolyn Weyen to the proceeds of said policy; that there is no evidence in the record that said policy was assigned to Elfrieda May for security for any indebtedness owed to her by the deceased; that the net proceeds of said policy should be awarded to E. J. Stanfill as trustee for Daryl Weyen and Carolyn Weyen.

X.

That the courts as a general rule have recognized the right of a plaintiff in interpleader actions to recover from the funds deposited in the registry of the court their costs and a reasonable attorney fee. The Court finds that in addition to their costs, the plaintiffs are entitled to a reasonable attorney fee in the amount of two percent of the total sum deposited by the plaintiff with the registry of the court.

Conclusions of Law

The Court concludes:

First: That the seven (7) insurance policies involved in this action and assigned to Ralph B. Defenbach by their language recognize the right of the insured to assign the same and that under the terms of the trust agreement dated September

23, 1953, Robert F. Weyen reserved the right to pledge any of such policies as collateral; that the defendant Robert B. Defenbach therefore will recover the net proceeds of all life insurance policies impleaded herein except Policy No. 1 477 698, which was assigned to Elfrieda May.

Second: That the defendant Elfrieda May having not contested the proceeds of Policy No. 1 447 698 insofar as the interests of said minor [11] children were concerned, the defendant E. J. Stanfill as trustee for Daryl Weyen and Carolyn Weyen, minors, will recover the net proceeds on said policy.

Third: None of the defendants will recover any costs against any other defendant or the plaintiff.

Fourth: That the plaintiff having impleaded said policies and having deposited with the registry of the court the net proceeds of said policies and in all ways having complied with their duties in interpleading in said cause, the action insofar as the plaintiff is concerned is dismissed.

Fifth: That the attorneys for the plaintiff are entitled to recover an attorney fee of two percent of the amount deposited with the registry of the court, which fee is allowed together with plaintiff's court costs.

Dated at Spokane, Washington, on this 30th day of December, 1955.

/s/ SAM M. DRIVER,
United States District Judge.

Presented by:
/s/ R. MAX ETTER,
/s/ PAUL C. KEETON,
Attorneys for Defendant Ralph B. Defenbach.

Acknowledgment of Service Attached. [12]

[Endorsed]: Filed December 30, 1955.

United States District Court for the Eastern District of Washington, Northern Division

No. 1309

SUN LIFE ASSURANCE COMPANY OF CANADA, a corporation, Plaintiff,

vs.

MARY P. WEYEN, individually and as guardian of Daryl Weyen and Carolyn Weyen, minors, ELFRIEDA MAY, RALPH B. DEFENBACH as trustee, E. J. STANFILL as trustee and E. J. STANFILL as executor of the estate of Robert Francis Weyen, deceased,
Defendants.

JUDGMENT

The above entitled cause having come on duly and regularly for trial before the Honorable Sam M. Driver, Judge of the above entitled court, for non-jury trial on Tuesday, the 18th day of October, 1955, at the court rooms of the above entitled court in Spokane, Washington, at 10 o'clock a.m.

ne plaintiff being represented by the law firm of raves, Kizer, Greenough & Gaiser of Spokane, Vashington; and the defendant Mary P. Weyen, ndividually and as guardian of Daryl Weyen and arolyn Weyen, minors, being represented by S. ean Arnold of Clarkston, Washington; the deendant Elfrieda May being represented by C. C. owan of Spokane, Washington; the defendant alph B. Defenbach as trustee being represented y Paul C. Keeton of Lewiston, Idaho, and R. Max tter of Spokane, Washington; and the defendnt E. J. Stanfill as trustee and E. J. Stanfill as xecutor of the estate of Robert Francis Weyen, eceased, being represented [13] by S. Dean Arnold f Clarkston, Washington. All of the attorneys for ne respective parties were present in court; and lfrieda May, Ralph B. Defenbach and E. J. Stanll appeared personally.

All parties having announced their readiness to roceed with the trial, the Court heard testimony f witnesses called on behalf of the plaintiff and ne defendants and examined documentary evidence ntroduced by all parties; and the case having been ubmitted to the Court and Findings of Fact and onclusions of Law having been entered, and havng directed that judgment be entered in accordnce therewith,

Now, Therefore, by reason of the law and the indings aforesaid, It Is Ordered, Adjudged and ecreed as follows:

First: That Ralph B. Defenbach, trustee, have

and recover the net proceeds of the following numbered policies, said proceedings having been deposited with the registry of the court, to-wit:

1,852,251	Sun Life Assurance Co. of Canada	$ 3,683.15
1,952.847	Sun Life Assurance Co. of Canada	9,767.30
1,710,519	Sun Life Assurance Co. of Canada	1,606.58
1,919,863	Sun Life Assurance Co. of Canada	5,746.87
1,755,413	Sun Life Assurance Co. of Canada	1,702.49
1,861,701	Sun Life Insurance Co. of Canada	19,603.42
1,861,700	Sun Life Assurance Co. of Canada	19,603.42

Second: That E. J. Stanfill as trustee for Daryl Weyen and Carolyn Weyen, minors, recover the net proceeds of Policy No. 1,447,698, being $1,831.20 and said proceeds having been deposited with the registry of the court by the plaintiff;

Third: That the action be, and the same is hereby dismissed insofar as the plaintiff is concerned.

Fourth: That the plaintiff have and recover from the moneys deposited with the registry of the court an attorney fee of two percent of [14] the total sums on deposit; and in addition thereto, that the plaintiff have and recover his court costs necessarily expended in said action.

Fifth: That the defendant Mary P. Weyen, individually and as guardian of Daryl Weyen and Carolyn Weyen, minors, take nothing.

Sixth: That none of the defendants shall recover any costs against any other defendant nor against the plaintiff.

Dated at Spokane, Washington, on this 30th ay of December, 1955.

/s/ SAM M. DRIVER,
United States District Judge.

Presented by:

/s/ R. MAX ETTER,
/s/ PAUL C. KEETON,
Attorneys for Ralph B. Defenbach.

Acknowledgment of Service Attached. [15]
[Endorsed]: Filed December 30, 1955.

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n the United States District Court, Eastern District of Washington, Northern Division

Civil Actions Nos. 1308-1309

. MAX ETTER and PAUL C. KEETON,
Petitioners,

vs.

ALPH B. DEFENBACH, as Trustee,
Defendant.

PETITION

Petitioners allege and petition as follows:

I.

That during all of the times herein mentioned etitioners were attorneys-at-law, engaged in the ractice of their profession, and they were so enged in such practice in the United States Disict Court for the Eastern District of Washington, orthern Division, that defendant, Ralph B. Defench, was a creditors' Trustee of certain estate and

properties of a deceased person, to-wit, Rober Weyen, during all the times herein mentioned.

II.

That defendant, Ralph B. Defenbach, was de fendant in actions brought and tried in and withi the jurisdiction of the United States District Court for the Eastern District of Washington, Northern Division, and that petitioners were counsel for sai Ralph B. Defenbach in said actions within th jurisdiction of said Court. That judgments in sai actions cannot be satisfied, nor can said actions b disposed of, until petitioners' liens and equity i said judgments have been determined by this Court

III.

That on or about April 16th, 1955, the said de fendant, Ralph B. Defenbach, employed said Pau C. Keeton as an attorney [16] and counsellor a law to represent him in matters which culminate in the representation and trial of cases in th United States District Court for the Eastern Dis trict of Washington, Northern Division. That o or about July 8th, 1955, the said defendant als employed petitioner, R. Max Etter, along wit Paul C. Keeton, to represent said defendant i matters which were commenced and pending i the United States District Court for the Easter District of Washington, Northern Division, an that the said petitioners did represent the said de fendant in said cases, and in the trial, and to th conclusion thereof in the District Court, to-wit, a follows: Sun Life Assurance Company of Canad

a corporation, plaintiff, vs. Mary P. Weyen, et al., defendants, Civil Action No. 1309; The Maccabees, a fraternal benefit society, plaintiff, vs. Mary P. Weyen individually, et al., defendants, Civil Action No. 1308, United States District Court for the Eastern District of Washington, Northern Division.

IV.

That said actions were successfully prosecuted by the petitioners and that the agreed and reasonable value of the services performed by the said petitioners was, and is, the sum of $16,500.00, as and for attorneys' fees; that no fee has been paid by defendant, although requested by said petitioners.

V.

That after entry of judgment a check was issued to the petitioners and to defendant, Ralph B. Defenbach, in the sum of $60,302.94, which is held by said petitioners and has been liened upon by said petitioners; that by reason of affirmance of said cause of action, to-wit, Action No. 1309 by the Court of Appeals for the Ninth Circuit there is also now due and payable to the said defendant in cause of action No. 1308 the sum of $5,832.00; that on or about the 20th day of June, 1956, Notices of Lien as to claims for fees [17] of petitioners in civil actions Nos. 1309 and 1308, as aforesaid, were filed in the above entitled cases with the Clerk of the United States District Court for the Eastern District of Washington, Northern Division, and likewise signed copies of said Notices of

Lien were sent by registered mail, delivered to and received by the said Ralph B. Defenbach, as Trustee.

VI.

That the agreed and reasonable value of the services performed by the said petitioners is the sum of $16,500.00, the amount claimed by Notices of Lien in the above entitled actions.

Wherefore, petitioners pray as follows:

1. That the Court order foreclosure of the liens in the above entitled cause for the full amount of $16,500.00, with interest at the statutory rate from June 20th, 1956; and

2. That the Court award the sum of $750.00 as attorneys' fees;

3. Award costs of action of said petitioners in said foreclosure;

4. That the Court order the defendant to execute the check now in the possession of the petitioners and pay therefrom the amount of the liens, or, in the alternative, that the said check now held in the possession of the petitioners be returned to the Clerk of the above entitled Court, and the Clerk directed to issue separate checks to petitioners and defendant, paying to petitioners said sum of $16,500.00 liened upon, and the balance to said defendant, Ralph B. Defenbach, as Trustee.

/s/ F. J. McKEVITT,
Attorney for Petitioners. [18]

Affidavit of Service Attached. [19]

[Endorsed]: Filed January 22, 1957.

[Title of District Court and Causes Nos. 1308-09.]

ANSWER TO PETITION

Answering the petition of R. Max Etter and Paul C. Keeton, defendant admits, denies and alleges:

I.

Admits the allegations of paragraph I.

II.

Admits the first sentence of paragraph II; denies the second sentence of said paragraph II, but defendant admits his willingness and desire to have the Court determine the issues herein involved.

III.

As to paragraph III, admits the first sentence thereof, except as to the date of employment, which defendant denies; as to the second sentence of said paragraph III, denies that R. Max Etter was employed by defendant, although it is admitted that R. Max Etter was employed by Paul C. Keeton with the subsequent acquiescence and consent of defendant, and denies that plaintiffs represented defendant to the conclusion of said cases.

IV.

As to paragraph IV, admits that the actions were successfully prosecuted by the petitioners during the period of their employment, but denies that either the agreed or reasonable value of the services performed by said petitioners was and is the sum of $16,500. [20]

V.

As to paragraph V admits all of said paragraph, except that defendant denies the validity of any liens aggregating $16,500.

VI.

As to paragraph VI, denies each and every allegation therein contained.

/s/ THOS. MALOTT,
Attorney for Defendant. [21]

NOTICE OF MOTION

To: Defendant Ralph B. Defenbach and to Paine, Lowe, Coffin & Herman, his attorneys:

You and Each of You Will Please Take Notice that the foregoing and hereto attached Motion to Supplement the record will be presented to the Honorable Sam M. Driver, Judge of the above entitled court at the Federal Court Building at Spokane, Washington, on Friday, August 3, 1956, at 10:00 o'clock a.m. of said day, and defendants J. E. Stanfill as trustee and Elfrieda May, will at such time and place request an Order directing that the record be supplemented accordingly.

This motion is made and based upon the files and records herein and upon Rule 75 of Federal Court Rules.

Dated this 25th day of July, 1956.

C. C. ROWAN,
S. DEAN ARNOLD,
Attorneys for Defendants
E. J. Stanfill as trustee
and Elfrieda May.

Acknowledgment of Service Attached. [22]

[Endorsed]: Filed January 31, 1957.

Title of District Court and Causes Nos. 1308-09.]

PETITIONERS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter coming on for hearing before me on the 31st day of January, 1957, on petition of R. Max Etter and Paul C. Keeton to foreclose an attorneys' lien and to fix the amount of fees to which petitioners are entitled in causes Nos. 1308 and 1309 of the files and records of the above entitled Court. Petitioners appeared in person and were represented by their counsel, F. J. McKevitt. Defendant appeared in person and was represented by his attorney, Thomas Malott. The Court having heard the evidence of both parties and having considered the briefs filed by the respective parties in said causes and being fully advised in the premises, makes the following:

Findings of Fact

I.

That defendant by stipulation made in open Court conceded the power of the Court to fore-

close said lien, and in his answer admitted his willingness and desire to have the Court determine the issues involved in the petition of petitioners.

II.

That without any specific contract as to attorneys' fees, petitioners for and on behalf of said defendant and at [23] his instance and request rendered legal services in causes Nos. 1308 and 1309 in the above entitled Court, in which causes the defendant, Ralph B. Defenbach, as Trustee, was successful.

III.

That for all practical purposes the employment of said petitioners by said defendant was on the basis of a contingent fee, since it appears from the evidence introduced in said causes that said petitioners would not have been paid a flat fee if the litigation which they conducted had not terminated successfully.

IV.

That the fair and reasonable value of the services rendered by said petitioners on behalf of the defendant, Ralph B. Defenbach, as Trustee, is the sum of $15,000.00.

From the foregoing Findings of Fact the Court makes the following:

Conclusions of Law

I.

That petitioners are entitled to recover for their services the sum of $15,000.00.

Done in open Court this 8th day of February, 1957.

/s/ SAM M. DRIVER,
Judge.

Presented by Attorney:
/s/ F. J. McKEVITT. [24]

[Letterhead of
Thomas Malott and Sidney Schulein.]

Mr. Frank J. McKevitt
Attorney at Law
Old National Bank Building
Spokane 1, Washington

February 4, 1957

Re: Etter et al. v. Defenbach, as Trustee

Dear Frank:

I return herewith the proposed Findings of Fact and Conclusions of Law, together with Judgment in this case, copies of which I have received.

I did not acknowledge service or O.K. as to form for the reason that I felt that the drafting of the proposed Findings of Fact and Conclusions of Law at this time is premature. You propose a finding that

> "petitioners would not have been paid a flat fee if the litigation which they conducted had not terminated successfully"

which is, of course, at variance with the letter written by Mr. Etter. I know that there is going to be a finding that a fee should be allowed but I do feel that it would be premature to accept from

you or propose to you any findings until we understand the Court's ruling.

I am, yours very truly,

/s/ THOMAS MALOTT.

TM:GN cc—Stanley D. Taylor [25]

[Endorsed]: Filed February 8, 1957.

In the District Court of the United States, Eastern District of Washington, Northern Division

Nos. 1308-1309

R. MAX ETTER and PAUL C. KEETON,
Petitioners,

vs.

RALPH B. DEFENBACH, as Trustee,
Defendant.

JUDGMENT

This matter coming on for hearing before me on the 31st day of January, 1957, on petition of R. Max Etter and Paul C. Keeton to foreclose an attorneys' lien and to fix the amount of fees to which petitioners are entitled in causes Nos. 1308 and 1309 of the files and records of the above entitled Court. Petitioners appeared in person and were represented by their counsel, F. J. McKevitt. Defendant appeared in person and was represented by his attorney, Thomas Malott. The Court having heard the evidence of both parties and having considered the briefs filed by the respective parties

in said causes and being fully advised in the premises, and having heretofore made its Findings of Fact and Conclusions of Law herein, it is

Ordered, Adjudged and Decreed that said lien be and the same is hereby foreclosed and that petitioners above named be and they are hereby awarded the sum of $15,000.00 as and for legal services rendered in Causes Nos. 1308 and 1309. It is further

Ordered, Adjudged and Decreed that that one certain check No. 3359, issued by the Clerk of the above entitled Court on February 29, 1956, in the sum of $60,302.94, and made payable jointly to R. Max Etter, Paul C. Keeton and Ralph B. Defenbach, as Trustee, he returned to the Clerk of [26] the above entitled Court and that there be disbursed therefrom the sum of $15,000.00, payable to R. Max Etter and Paul C. Keeton, and the sum of $45,302.94, payable to Ralph B. Defenbach, as Trustee.

Done in Open Court this 8th day of February, 1957.

/s/ SAM M. DRIVER,
Judge.

Presented by Attorney:
/s/ F. J. McKEVITT. [27]

[Endorsed]: Filed February 8, 1957.

[Title of District Court and Causes Nos. 1308-09.]

NOTICE OF APPEAL

Notice Is Hereby Given that Ralph B. Defenbach, as trustee, the defendant above named, does hereby appeal to the United States Court of Appeals for the Ninth Circuit, from the order and judgment fixing and allowing attorneys' fees to petitioners above named, entered in the above actions on February 8, 1957.

/s/ THOMAS MALOTT,
Attorney for Defendant.

Affidavit of Service by Mail Attached. [28]

[Endorsed]: Filed March 8, 1957.

United States District Court, Eastern District of Washington, Northern Division

Civil Nos. 1308-1309

R. MAX ETTER and PAUL C. KEETON,
Petitioners,

vs.

RALPH B. DEFENBACH, as Trustee,
Defendant.

RECORD OF PROCEEDINGS

Be It Remembered that the above-entitled cause came on for hearing at Spokane, Washington, on Thursday, January 31, 1957, before the Honorable Sam M. Driver, Judge of the above-entitled Court;

the petitioners being personally present and represented by Francis J. McKevitt; the defendant being personally present and represented by Thomas Malott;

Whereupon, the following proceedings were had, to-wit: [31]

The Court: Let's see, that brings us down to the final one, Etter and Keeton against Defenbach.

Mr. McKevitt: Yes, your Honor. Shall I proceed, your Honor?

Mr. Malott: Before you proceed, Mr. McKevitt, please, I hand to the Court—I don't know whether that calls for an answer—I filed an answer.

The Court: It may be filed. I would like the record to show, however, that both parties here through counsel, Etter and Keeton, plaintiffs, and Defenbach, Trustee, the defendant, are willing to submit this matter to the Court on the merits this afternoon.

Mr. McKevitt: That is correct.

The Court: All right.

Mr. Malott: Yes.

Mr. McKevitt: I think preliminarily I should state to your Honor and for your Honor's information that in the case of Stanfill, as Trustee, and Elfrieda May, Appellants, vs. Defenbach, appeal was from the judgment entered by your Honor. As you will recall, that judgment was entered December 30, 1955. Of course, the opinion of the Court having been rendered on January 4, 1957, the mandate of the Court is not down and we are agreeable——

The Court: Final order should not be entered until the mandate gets down. [32]

Mr. McKevitt: That is correct.

The Court: I can announce my decision, but it shouldn't be entered until the mandate comes down.

Mr. McKevitt: Very well.

The Court: I wonder if counsel would stipulate that the Court may take notice of all matters that came before the Court in the trial as to the character of the work done, the issues, and——

Mr. Malott: I will so stipulate. I would hope that the Court in taking notice of those things would in its opinion mention those things of which it does take notice, thereby become part of the record.

The Court: Yes, I see.

Mr. McKevitt: In connection with that observation, your Honor, I spoke to Mr. Malott several days ago and he is agreeable to having the formal records in the other cases considered. I think the number is 1309, isn't it?

The Clerk: 1308 and 1309, the case that was tried.

The Court: I haven't had an opportunity to read your answer here, of course.

Mr. McKevitt: I can review it very briefly.

The Court: Well, I just wanted to ask this question: Is the issue here merely the amount of the attorney fees, or do you question the plaintiffs' right to collect any attorney fee? [33]

Mr. Malott: No question. No, we submit that an

ıttorney fee should be fixed and we are just as ınxious——

The Court: Do you both agree on the basis of vhat is a reasonable fee for the services rendered?

Mr. Malott: I think not. I think there is quite sharp conflict as to the basis, as to whether it is contractual fee or whether it is quantum meruit.

The Court: Is it a claimed contractual fee?

Mr. McKevitt: We have alleged, as we are permitted to do, as your Honor well knows, in the petition that the amount which they are seeking to ecover, Mr. Keeton and Mr. Etter, some $16,500, believe, was the agreed and reasonable value of he service. However, I will say at the outset now hat we are not in a position to establish a definite contract between these attorneys and Mr. Defnbach as to any fee, contingent or otherwise, and 'e are here on the basis that this amount of $16,-00 is a reasonable fee, under all the circumstances,) be allowed.

The Court: Mr. Defenbach was trustee for the enefit of the creditors of the deceased, wasn't he?

Mr. McKevitt: That is correct, your Honor.

The Court: And was in Idaho.

Mr. Keeton: Yes, Lewiston.

The Court: Is it under some state procedure 34] such as our assignment for the benefit of creditors here in Washington?

Mr. Keeton: Same sort of a proposition.

The Court: More or less out of court?

Mr. Keeton: Out of court.

The Court: The trustee isn't subject to the im mediate supervision of the court, then?

Mr. Keeton: No, your Honor.

The Court: I see, all right.

Mr. Malott: Just clarification, Mr. Defenbacl tells me, however, that it has been the plan of th creditors in this case all the way through to submi the final account to a court, but it isn't mandatory

Mr. McKevitt: With reference to stipulatin that the records in 1308 and 1309 and reply, I hav called them, Mr. Taylor may be considered as ex hibits in this case, at least down to and includin the entry of the judgment in the case in Decembe —what was the date of that, Paul?

Mr. Keeton: December 29th.

Mr. McKevitt: December 30, 1955; that follow ing the entry of that judgment, and through cir cumstances that are not here material, the service of yourself and Mr. Etter were terminated; is tha not correct?

Mr. Keeton: Shortly thereafter. I don't wish t [35] be a player leaping from the bench, but Th Macabees case was also involved in this, and hi Honor should look at the two cases, Sun Life As surance and Macabees.

The Court: Well, yes, I think I said "in thi case," but there were two of them that were trie Perhaps you should refer to them by number.

Mr. McKevitt: Is it 1308 and 9, is one, the Su Life, and the other Macabees?

The Clerk: Yes, sir. Sun Life Assurance is N 1309; the Macabees is No. 1308.

The Court: All right.

The Clerk: And, your Honor, 1308 was not ried.

The Court: 1308.

Mr. McKevitt: That was The Macabees case.

The Court: Yes.

The Clerk: That was The Macabees.

The Court: The same issues were involved.

Mr. McKevitt: The Sun Life Assurance deter- ined the outcome of the other case.

Mr. Malott: Why not extend the stipulation that e files may be considered for all purposes in so ar as they may be material? You tried to qual- y it.

The Court: I think his qualification was up to e time of the termination of the employment of e plaintiffs. [36]

Mr. McKevitt: Yes, because they did not par- cipate directly in the appeal to the Circuit Court Appeals, although they did participate, as we ill attempt to show, indirectly in a very substan- al manner by virtue of the legal groundwork they d laid before your Honor, which quite simplified, e think, the task of the firm that took the case to e Circuit Court of Appeals.

With that statement, and your Honor being then formed as to the nature of the petition and the efendant's answer, may I proceed with the testi- ony?

The Court: Yes.

Mr. McKevitt: I would like to put Mr. Keeton n the witness stand.

The Court: Unless you have an opening statement to make, Mr. Malott.

Mr. Malott: No, I think not, I will reserve.

PAUL C. KEETON

a petitioner herein, called and sworn as a witness on his own behalf, was examined and testified as follows:

Direct Examination

Q. (By Mr. McKevitt): Your name is Paul C. Keeton? A. Yes, sir.

Q. You are one of the petitioners in this proceeding? A. I am. [37]

Q. You reside in Lewiston, Idaho?

A. I do.

Q. Practicing lawyer? A. Yes, sir.

Q. Admitted to practice in the State of Idaho State and Federal Courts? A. I am.

Q. And you have, I understand, occasional practice in the State and Federal Courts in Washington?

A. I am admitted in this Federal Court here

Q. Mr. Keeton, how long have you been practicing law?

A. I have been practicing law 17 years.

Q. And in connection with your practice, I assume that you have had occasion to represent both plaintiffs and defendants in trials of contested actions before courts and before juries?

A. Yes, I have a general practice, doing both

Q. Been in court on numerous occasions?

A. Yes.

(Testimony of Paul C. Keeton.)

Q. Been before the Supreme Court of your own state, I take it, on numerous occasions?

A. On numerous occasions.

Q. Yes. Well, now, I would like to ask you first, when did you first become acquainted with Mr. Robert Weyen? [38]

Mr. McKevitt: I might say he was the deceased insured in these policies, your Honor.

The Court: Yes.

A. 1954.

Q. (By Mr. McKevitt): Briefly explain to the Court how that acquaintanceship arose and what followed after so far as any legal phase is concerned.

A. Well, Mr. Weyen was logging in and about Lewiston and on several occasions I worked his income tax returns and did small logging contract jobs for him.

Q. Now, with reference to the matter in issue in this action, when did you meet Mr. Defenbach? I don't know how you pronounce that.

A. When did I first become acquainted with Mr. Defenbach?

Q. Yes, first?

A. I have known him for a long time. 1945.

Q. You have done legal work for Mr. Defenbach prior to this time?

A. Not for him, but he does tax work and frequently he has done tax work on estates or other matters that I had.

Q. Well, now, in connection with this contro-

(Testimony of Paul C. Keeton.)

versy here, Mr. Keeton, when did you first have any——

A. Well, Mr. Defenbach had been doing some tax work for Mr. Weyen—in fact, I had recommended that Mr. Weyen [39] see Mr. Defenbach probably in 1952 or '53, along in there, and he had worked several tax returns for him. And then Mr. Weyen was in grave financial difficulties in 1954, so a creditors pool agreement was set up, which is an exhibit in the Sun Life case, and Mr. Defenbach was designated as the trustee for the creditors in that pool. I prepared the pool agreement and had many discussions with Mr. Defenbach in and about that time and thereafter.

Q. That is the same agreement of November 16 1954?

A. Yes. Of course, I was not representing Mr. Defenbach at that time, however.

Q. No, I understand. A. Yes.

Q. But briefly, and with reference to the financial difficulties of Mr. Weyen and at the time of the execution of that agreement, approximately what was his indebtedness?

A. Well, it would be over $200,000 on open accounts and secured accounts.

Q. And what, if anything, did he have by way of assets at the time he entered into this agreement?

A. Well, he had a going logging job and tractor and logging equipment. Of course, all of which were

(Testimony of Paul C. Keeton.)

under chattel mortgages or conditional sales contracts. [40]

Q. At the time that agreement of November, '54 was entered into, you, of course, I take it, were fully familiar with the prior agreement that is, we might say, the Stanfill Trust?

A. No, I was not.

Q. You were not acquainted with that at that time? A. No, sir.

Q. And then following the execution of the agreement of November of 1954, you ascertained in the course of its preparation the existence of certain policies of life insurance on Mr. Weyen, did you not?

A. Yes, there were several with the Sun Life and several with The Macabees—at least one with The Macabees — and two were with the Mutual Health Benefit and Accident Association, which were placed in the pool with Mr. Defenbach as beneficiary in the event of Mr. Weyen's death.

Q. And this pool was for the benefit of the creditors, secured and unsecured, of Mr. Weyen?

A. About $68,000 worth of unsecured creditors and about $140,000 worth of secured creditors.

Q. Yes.

The Court: What was the security on, Mr. Keeton? On his equipment?

A. On tractors and loaders, and so forth. [41]

The Court: All right.

Q. (By Mr. McKevitt): And, of course, you ascertained the existence of the Stanfill Trust some-

(Testimony of Paul C. Keeton.)

time subsequent to the execution of the agreement of 1954?

A. I am certain that the first time I became acquainted with the so-called Stanfill Trust was after his death.

Q. And then after a study of that trust, you observed the distinction between its provisions and the one that you drew? A. Yes.

Q. And the primary difference was what?

A. Well——

Q. Having reference now, we'll say, to the children?

A. Well, in the Stanfill Trust, of course, the children would have got all of the insurance money and in the so-called Defenbach Trust, it would have gone to the creditors, secured and unsecured.

Q. To the exclusion of the children?

A. To the exclusion of the children.

Q. You spoke now of certain policies of insurance issued by Sun Life Assurance Company. I will ask you if the aggregate amount of these policies was not $60,303.92?

A. That is exactly it, with double indemnity.

Q. They had double indemnity provisions?

A. That's right. [42]

Q. Mr. Weyen came to his death accidentally?

A. He died April 16, 1955.

Q. And The Macabees Insurance Company policy, the aggregate sum of $5,832?

A. That was a $3,000 policy with double indem

(Testimony of Paul C. Keeton.)

ity, and then the reason it doesn't quite total six
s there was a loan against it.

Q. But the amount of it, at any rate, was $5,832,
s that correct? A. That is exactly.

Q. Now, you spoke also of one or two policies,
believe, in the Mutual Benefit of Omaha. One was
or $2,500 and the other for $5,000?

A. That is correct.

Q. But they didn't enter into the litigation out
f which this litigation has arisen, did they?

A. No. If you wish, I can explain that very
uickly how that happened.

Q. Yes, I wish you would for the benefit of the
ourt.

A. All right. As soon as Mr. Weyen died, Mr.
efenbach and I discussed the matter of collecting
ie insurance policies to put the money in this pool
nd I wrote letters to the Sun Life and to The
acabees and found out very shortly after his
eath that his ex-wife had protested the payments,
at his mother had protested [43] the payments,
at Mr. Stanfill, on account of the Stanfill Trust,
nd protested the payments; but on the two poli-
es from the Mutual Health, Accident and Benefit
ssociation, for some reason they put in no proof.
o immediately I procured claims from them, Mr.
efenbach and I filled them out, we sent them
mediately in, and, of course, they immediately
aid, but on all the others, the Sun Life and The
acabees, they refused to pay any money to anyone.

Q. Well, what you did then was get into the

(Testimony of Paul C. Keeton.)

hands of Mr. Defenbach shortly after the death o Mr. Weyen at least the proceeds of the Omaha Pol icies? A. Which was about $8,000.

Q. I believe that we listed then 2,500 in one an 5,000 in the other.

A. Yes, and if you die under those policies, the pay you back all the premium you paid in. I don' understand it, but that is how it came to be ove $8,000.

Q. Do you want to amplify that any furthe Paul, in connection with those two policies?

A. No.

Q. That is——

A. That is where actually I started representin Mr. Defenbach as trustee for the pool, was righ at that time, immediately following the death. [44

Q. Then, particularly in connection with thos two policies?

A. And with the Sun Life and The Macabees, c course, which I got turned down on.

Q. Yes. Well, now, in connection with the Su Life policies, which we have pointed out to h Honor aggregate some $60,302, and prior to th institution of this action brought on behalf of De enbach as trustee, did you have any conferenc with other attorneys or representatives of oth claimants?

A. Yes, I had conferences with Mr. Defenbac on several occasions.

Q. When did they take place?

A. They took place in my office——

(Testimony of Paul C. Keeton.)

Q. At Lewiston?

A. ——explaining to him that the payment of ne policies had been protested, and then on July st, in the office of Mr. Paul Hyatt in Lewiston, a neeting was held, at which meeting there were resent Mr. Defenbach, Mr. Russell Randall——

Q. He is an attorney at Lewiston?

A. Mr. Hyatt, Mr. C. C. Rowan of Spokane, an nterested creditor in this matter, and myself.

Q. What was the purpose of that meeting?

A. Well, Mr. Rowan had come down to advise s that there [45] was going to be filed an inter-leader action by the Sun Life Company and that e had thoroughly briefed the law and that the oney would all go into the Stanfill Trust.

Q. Which you considered as being tantamount to declaration that the assignment that you drew asn't of much legal validity?

A. He said on that day that the Stanfill Trust as irrevocable on many and many occasions. He nphasized it was irrevocable and that he, repre-nting Mrs. May and indirectly the children un-r the Stanfill Trust, would recover all the money.

Q. And those assertions, or some of them, on the art of Mr. Rowan, were they made in the pres-ce of Mr. Defenbach?

A. All of them were made in his presence.

Q. Did he exhibit some concern about the legal sition that was taken by Mr. Rowan?

A. Well, in a *clam* way, yes.

Q. Well, then, were there any conferences of

(Testimony of Paul C. Keeton.)

that nature such as you have narrated subsequen to the ones that you just referred to and prior t the institution of the interpleader action?

A. No, there were no more conferences unt after the filing of the interpleader action, whic was—well, [46] very shortly thereafter. That wa filed about the 10th of July or something very clos to that.

Q. Did you make an explanation to Mr. Defe bach about the nature of this interpleader actio why it was brought, and so on?

A. Oh, yes, Mr. Defenbach understood that the insurance company couldn't determine wh were the proper claimants on these policies, tha there was a manner by which they could sue ever one that was interested, and I advised him that tha would happen and he would surely be served wit process, and then shortly thereafter he was serve with process, which he brought to my office.

Q. In other words, you advised him that th insurance companies were not going to take upo themselves the responsibility of determining th disbursements of these funds, is that true?

A. I advised that it was a certainty that a interpleader action would be filed in the case, ye

Q. Well, now, after the interpleader action w filed and was served, of course, he delivered th complaint to you? A. Yes.

Q. What did you then do in connection wi that litigation?

A. I discussed the interpleader case all ove

(Testimony of Paul C. Keeton.)

and it had [47] been filed in the District Court for the Eastern District of Washington in Spokane County and so I made arrangements thereafter, either by letter or telephone, with Mr. Etter to join with me under the rules of the court, and I took it on myself to prepare entirely——

Q. Before you get to that, Paul, did you advise Mr. Defenbach that you were going to associate Mr. Etter and why you thought he should be associated?

A. I am certain that I told Mr. Defenbach that I was going to associate Mr. Etter, yes. Whether I advised him of the court rule here that it was necessary, I am not——

Mr. Malott: You advised him before, in advance?

Mr. McKevitt: Before he employed him.

Q. Well, in other words, you considered it necessary to have a Washington legal representation in connection with your services, is that true?

A. I did.

Q. Now, do you recall then when, if there was, the first meeting in which Mr. Defenbach and yourself and Mr. Etter were present in connection with this litigation?

A. No, I'm not sure of the first time. I can tell you one of the times, which would have been the 17th day of October of 1955.

Q. Well, prior to that time, had there been any discussion [48] between Mr. Defenbach and yourself concerning attorney fees?

A. Yes, I discussed it with Mr. Defenbach.

(Testimony of Paul C. Keeton.)

Q. And what was the result of that discussion? What did you say to him and the substance and what did he say to you?

A. Well, Mr. Defenbach told me on many occasions that his position was a very vague one; that he didn't know what he could do with the approximately $8,000 that he had on hand. There were 40,000, or in that neighborhood, of tax liens.

Q. State and Federal? A. State and——

Mr. Malott: Pardon me, are you narrating conversation or giving background? I don't care, but I wish you would distinguish.

A. I am narrating conversation.

Mr. Malott: Okay.

A. Mr. Defenbach and I discussed the tax liens which were on this money, aggregating, I think, 36,000 plus, for sure—in fact, I have them all here, the tax liens; that also Mr. Weyen had been accused by the Federal Government of a timber trespass and both Mr. Defenbach and I had been warned by the United States Attorney that they claimed a priority on any moneys in this [49] creditors' pool first, and also the United States Attorney advised Mr. Defenbach by letter that he would hold Mr. Defenbach personally liable if he paid out any creditors or anybody ahead of the U. S. Government on both the tax liens and the timber trespass, and I have his letter right here if you would like to see it.

Q. (By Mr. McKevitt): Well, at any time then and because of his feeling in that regard, did he

(Testimony of Paul C. Keeton.)

advance you any moneys of any kind or character by way of expense or anything else?

A. He did not.

The Court: I don't think it makes any difference, probably, but is that the United States Attorney for the District of Idaho?

A. Yes, sir.

The Court: Yes, all right.

Q. (By Mr. McKevitt): Do you have a copy of that letter?

The Court: I don't care to see the letter, I just was curious to know whether it was this office or the Idaho office. It doesn't make any difference.

Mr. McKevitt: It is a very peremptory demand —I don't mean peremptory, but I mean very indicative of their position.

The Witness: I might state one more thing, [50] Mr. McKevitt.

Q. Go ahead.

A. Regarding the holding of the moneys in the fund, immediately after Mr. Weyen's death, the Bureau of Internal Revenue notified Mr. Defenbach that they were going to go back several years and audit Mr. Weyen's tax returns for income tax assessments or violation and that he would have to impound all of his records and hold all of his records together undisturbed, so to speak. So Mr. Defenbach rented an office in the same building that my office is in, these records were impounded in that building, and on account of the letter which Mr. Defenbach is looking at now, no moneys were

(Testimony of Paul C. Keeton.)

paid out on that office for the rent, which was accruing at the rate of $25 per month, for eleven and one-fifth months.

Q. And while we are on that subject, is it not the fact that the payment was finally made after the entry of judgment in this court; is that true?

A. The payment of the rent was made three and a half months after the entry of the judgment in this Court on March 14, 1956. There is the receipt for the rent (indicating).

Q. Well, now, can that chronologically bring us down to a meeting then had between yourself and [51] Mr. Etter and Mr. Defenbach? A. Yes.

Q. All right, tell the Court about that.

A. Well, I had had discussions, as I said, with Mr. Defenbach about what to do with the 8,000 some odd dollars there were on hand on numerous occasions. He told me that until his position was clarified, he wasn't going to do anything with it or pay it out at all, because the government might consider him what they call a transferee and also——

Mr. Malott: Pardon me, Mr. Keeton, are you now narrating, telling of the conversation in Mr. Etter's office?

A. No, I am not.

Mr. Malott: I think that was the question.

A. It is not responsive, I will answer it.

Mr. Malott: I don't want to be technical, but I am trying to distinguish between conversation and background.

Testimony of Paul C. Keeton.)

Mr. McKevitt: I see.

Mr. Malott: That is what I am trying to do.

The Court: That was just introductory, probbly. Your question called for conversation in Mr. tter's office.

Mr. McKevitt: Well, I don't know whether it as in [52] Mr. Etter's office, but where the three f them were present. I think the three were in pokane.

A. All right, there were three——

Mr. Malott: Pardon me, if you will just try to istinguish. I have no objection to giving backround if you try to distinguish between backround and direct conversation.

A. I will tell the time and place of each conersation.

Mr. Malott: Yes.

A. The day before the trial on October 17th of 955, Mr. Defenbach had come from Lewiston and o had I and we were over in the Ridpath Hotel. t that time I told Mr. Defenbach that I had prepared a letter that I was going to give him concerning a fee arrangement in this case, as we had ad none so far. He told me that it would be no se because he felt that he had no authority whatsever to make any fee in the case; there would e no use to talk with him about any agreement r any fees in the case.

And I went over to Mr. Etter's office and told at to Mr. Etter, and he came back with me to e hotel.

(Testimony of Paul C. Keeton.)

Q. (By Mr. McKevitt): Well, maybe we haven't established when Mr. Etter definitely came into the litigation after the interpleader action was filed.

A. Mr. Etter came into the litigation on 7-25-55

The Court: I am going to take a recess now and I have asked for presentence investigation reports in three criminal cases and if they are ready I think I will take them up right after the recess Shouldn't take very long.

(Whereupon, a recess was taken.)

Q. (By Mr. McKevitt): Now, with reference to any meeting that was had between you and Mr Etter and Mr. Defenbach and pertaining to this litigation, when did you say that took place and where?

A. Well, it took place the night before the trial on the 17th in the Ridpath Hotel.

Q. Three of you present?

A. Three of us present.

Q. Was there a fee discussion, a discussion about fees?

A. Yes, I had been to Mr. Etter's office and told him that——

Mr. Malott: Pardon me, I wish you would try to stick to the discussion.

A. Yes, there was a discussion about fees at that time.

Q. (By Mr. McKevitt): The three of you there

A. Yes.

Q. What was that discussion? What was said

A. Well, Mr. Defenbach said that on account of

(Testimony of Paul C. Keeton.)

he tax liens and various restraints that were put n that, that [54] he would not be able to pay any ees at that time.

Q. And was he concerned at all about any in- ormation he had received from the Federal Gov- rnment about possible personal liability on his art? A. Yes, he was.

Q. Is that referred to in this letter of Novem- er 16, 1955 to Mr. Defenbach from the United tates Attorney in Boise? A. That's right.

Q. Well, now, in this conversation in this meet- g here in Spokane, did Mr. Etter make any ob- rvation to Mr. Defenbach about fees?

A. Well, Mr. Etter wanted a retainer fee on te case. He asked Mr. Defenbach for a retainer fe on the case, and Mr. Defenbach explained, as I have said, that he would not pay any of this roney out on account of the fact of all these prior aims, and also that under the Defenbach Trust- ent agreement of November 15th——

Q. 1954.

A. ——1954, in that agreement the government s a priority to any moneys that come into the ol. So Mr. Etter at that time said: "Well, under ose circumstances, we take these cases on a con- gent fee or handle them on a contingent fee."

Q. Did Mr. Etter make any observation as to [5] the amount of the contingent fee?

A. He talked about percentages, yes. He talked out 25 per cent if settled, 30 per cent if tried,

(Testimony of Paul C. Keeton.)

and 40 per cent if appealed, and Mr. Defenbach said that he could not agree to anything.

Q. Well, did he say anything with reference t the reasonableness or unreasonableness of such a arrangement if he had been able to enter into it

A. He said——

Mr. Malott: Objected to, if the Court please, i it is for the purpose of proving a contract.

The Court: No——

Mr. McKevitt: No, it isn't for the purpose c proving a contract.

Mr. Malott: The witness is not an expert on th thing and his opinion would not——

The Court: Well, it might be an admissio against interest. I will let him answer.

Mr. McKevitt: My position was, accepting th to be true, that it showed that he considered a that time the fee to be reasonable. That is my pu pose, your Honor.

The Court: I see.

A. He said that he had no objection to th type of arrangement, but, however, he would n agree to it.

Q. Is that where the matter then was left [5 standing so far as fees were concerned?

A. That was where the matter was left standin

Q. Now, with reference to certain items of e pense entailed by yourself coming to Spokane fro Lewiston, going back, and remaining here and oth items, were they all paid out of your person account?

(Testimony of Paul C. Keeton.)

A. Paid all my expenses out of my own personal account.

Q. What do they amount to? Do you have a record of them?

A. Well, I was in to Spokane seven times.

Q. In connection with this litigation?

A. This litigation, and my hotel bills were $8.12, $5.17, $18.15, $50.53, $9, $14.92.

The Court: The plaintiffs are not claiming this in addition to showing what was expended? All right, go ahead.

Mr. McKevitt: Yes, your Honor.

Mr. Malott: I got a total of $105.89 on that.

The Court: Is that correct, $105.89?

Mr. Malott: Very quickly added.

The Court: Go ahead.

A. In addition to that, I drove my car on those occasions and it was 225 miles from here to Lewiston roundtrip and I would figure that it would cost you a minimum to drive your car back and forth $70 on seven trips.

Q. (By Mr. McKevitt): Now, Mr. Keeton, you [57] referred to certain tax liens——

Mr. McKevitt: And I think for the purpose of this record, your Honor, to protect it, I better have them marked.

The Court: All right.

Mr. McKevitt: Reduced and produced in evidence. And while the Clerk is marking those, it isn't our intention to encumber the record with

(Testimony of Paul C. Keeton.)

to make in this connection that I have overlooked asking you? A. No, I don't think so.

Q. Oh, by the way, after the entry of judgment, is it not a fact that the appeal steps that were initiated by Mr. Defenbach up to a certain point, that they were processed through Mr. Etter's office?

A. Well, yes, all of the appeal was processed [60] through either his office or mine up until, oh, sometime maybe as late as June of '56.

Q. Well, the perfecting of the appeal would be by Defenbach, but I mean the records on appeal were submitted to Mr. Etter and to you?

A. That's right.

Q. For examination? A. That's right.

Q. And the records were examined on appeal were they, by you and Mr. Etter?

A. That's right.

Q. Now, Mr. Keeton, do you have an opinion then as to the reasonable value of your services rendered in this litigation by yourself and Mr. Etter? Do you have an opinion?

A. Yes, I have an opinion.

Q. What is it?

A. I have an opinion that we are entitled to 2[illegible] per cent of the recovery in this case.

Mr. McKevitt: You may examine.

Cross Examination

Q. (By Mr. Malott): How long did this trial last, the trial proper, last? A. One day. [61]

Q. One day. What time of the day did it start

(Testimony of Paul C. Keeton.)

A. Oh, I think shortly after 10 in the morning.

Q. What time did it close?

A. Oh, I think around 3 in the afternoon.

Q. And then prior to that time, what preliminary motions did you have in court?

A. Well, we will have to have the docket.

Q. If you can recall how many times you were in court on preliminary motions?

A. May I ask a question off the record? Do you mean how many times was I in court or he, or both of us?

Q. I am going to cover both of you.

A. All right. Prior to the trial, I would say four times, by looking at this fast.

Q. What were those matters that you were in here on? Let me ask you this, was there a pre-trial? A. No pre-trial conference.

Q. Was there a motion to dismiss?

A. No motion to dismiss.

Q. What was the nature of the preliminary matters that you handled, then? I am just going to ask the question. If you want to confer with Mr. Etter, I have no objection, if it is all right with the Court, if Mr. Etter can answer better.

A. Well, why don't we offer the docket, if you wouldn't care? [62]

Mr. McKevitt: Let's see it.

A. I might say that I wasn't up here so I don't know how many times.

Mr. Malott: I see.

Mr. McKevitt: Would you mark that as a peti-

(Testimony of Paul C. Keeton.)

tioners' exhibit and we will offer it in evidence?

The Clerk: Marking Petitioners' B.

The Court: All right.

Q. (By Mr. Malott): Now, Mr. Keeton, at the outset, at the beginning of this matter when you first undertook employment, didn't you and Mr. Defenbach agree both with each other that you would defer the matter of asking for fees until the matter was brought to a conclusion, and that at that time you would look at the over-all results and what had happened in the thing and both render your bills at that later date when the matter was all wound up?

A. That is a part of the discussion, yes.

Q. At the outset, it was so agreed, wasn't it?

A. If you add certain things to it, it was, yes.

Q. Now, the next thing I wanted to ask you you stated on direct examination that prior to associating Mr. Etter in this proceeding you advised Mr. Defenbach of your intention so to do. I am going to ask you, isn't [63] it a fact that you did not tell him before associating Mr. Etter?

The Court: Pardon me, this has been offered. Have you any objection to it?

Mr. Malott: I didn't know it had been offered. Well, this is the Clerk's——

A. That is our docket.

The Court: No, that is their docket.

The Clerk: That isn't the Clerk's.

Mr. Malott: I would prefer to have Mr. Etter testify before it is admitted.

Testimony of Paul C. Keeton.)

The Court: Well, all right.

Mr. Malott: I am objecting as to no sufficient identification.

The Court: All right. No, there isn't.

The Witness: It could be, Mr. Malott, that I prepared the answer to this interpleader case; that I talked with Mr. Etter about it, that we signed our names to it, and to file it up here, I had to have Washington counsel, and it could be either before or at the time or immediately after that that I advised Mr. Defenbach, but Mr. Defenbach knew very early in this litigation that Mr. Etter was in the case.

Q. (By Mr. Malott): Oh, yes. Please understand I am not making any accusations that there [54] is anything wrong, I am simply asking if the choice was not yours and actually Mr. Etter was employed by you? A. I picked him out.

Q. Yes, you picked him out. And now with reference to these matters of the claims of the taxing agencies, these tax liens, you had conferences with the Director of Internal Revenue relative to administration of this estate and using the money of the estate for the purpose of carrying on this litigation, didn't you? A. I never did.

Q. You never did.

Mr. Malott: Will you mark this, please?

The Clerk: I have marked this as Respondent's C for identification.

Mr. Malott: Do you have any objection to Respondent's C? That is the letter——

(Testimony of Paul C. Keeton.)

Mr. McKevitt: I haven't read this.

The Witness: You have read that, sure.

Mr. McKevitt: It is your exhibit? Oh. We have no objection.

The Court: It will be admitted.

(Whereupon, the said letter was admitted in evidence as Respondent's Exhibit C.)

[See pages 130-131.]

Q. (By Mr. Malott): Showing you Respondent's Exhibit C, I [65] wonder if Mr. Defenbach or somebody underscored a portion of it. That has been underscored, "that before paying creditors," that has been underscored in the courtroom, has it not? A. Yes.

Mr. McKevitt: I think I did that, Tom.

Mr. Malott: Oh, did you do it? Mr. McKevitt then, underscored it.

Just to summarize, if I may, this Exhibit C letter from the United States Attorney in Boise pointing out the existence to Mr. Defenbach and advising him of tax liens, of a judgment against Mr. Weyen for $444 and a claim of the Internal Revenue Service for $34,398.62, the third paragraph of which letter states:

"The United States is entitled to priority of payment of these claims by reason of Federal Statute 31 USC, 191. 31 USC, 919, makes the assignee for the benefit of creditors personally responsible to the United States if he fails to pay the debts of the United States before paying other creditors."

(Testimony of Paul C. Keeton.)

Q. Now, do you say that you and he, you and Mr. Defenbach, were aware of this letter?

A. Yes, I made that copy in my office. [66]

Q. You made that copy. Now, did you advise—or put it this way: You never felt that anything in the revenue laws was going to preclude you from paying reasonable costs of administering the estate before paying the government?

A. I didn't know the answer to that.

Q. Well, you did read the letter. It was a warning not to pay other creditors; there was no warning you ever received from the United States Government or anybody else advising that you couldn't pay reasonable and necessary costs of administration, did you?

A. No, not in those words, no.

Q. Very well. And you knew, of course, and always expected, that there would be some money available for the payment of attorney fees in this action, didn't you?

A. No, I didn't know that there would be any available.

Q. Didn't you expect to get a flat fee, some kind of a flat fee, for the conduct of this litigation regardless of the outcome?

A. Not if the government took all the money under the tax liens, I sure didn't.

Q. Of course not, of course if they took ahead of you. I am talking about your frame of mind, didn't you always expect you would receive a flat fee for the trial of this case? [67]

(Testimony of Paul C. Keeton.)

Mr. McKevitt: From whom?

Mr. Malott: Out of the funds of the estate.

A. No, I didn't.

Q. (By Mr. Malott): You did not?

A. No. I hoped that that was true. If the big case was lost, yes, I hoped it was true.

Q. If the big case was lost, you hoped to still collect out of the estate, didn't you?

A. If the government didn't take it all.

Q. Well, but I mean you expected that your claim for attorney fees in fighting this big case would take precedence over the government's tax liens? A. I didn't think it would.

Q. Didn't think it would. But you were going to try that, weren't you?

A. Well, I never came to that, I never got to that juncture.

Q. All right. I just ask you categorically if you didn't know—well, I have asked you that.

Now, with reference to actual trial of the lawsuit itself, there were no substantial disputes over the facts in the case, were there?

A. Yes, I would say there were some very substantial disputes over the facts in the case. [68]

Q. And the case ended up as a mixed question of law and fact?

A. I would say it ended up more as a question of law, Mr. Malott, than a question of fact, as it ended up.

Q. You and his Honor are much more familiar with this case than I am, but could you tell us

(Testimony of Paul C. Keeton.)

where the factual disputes arose, where the case turned on questions of fact, of disputed questions of fact?

A. Well, the case turned on the priority of the claims of the various people involved in the case. In other words, one person claimed a priority because of the payment of part of the insurance premiums.

Q. I understand that, yes.

A. Another person in the case claimed a priority on account of being the ex-wife. Whether she intended to say the divorce was no good or not, we didn't know until the case was tried. The other parts of the case hinged on whether the so-called Stanfill Trust took precedence over the so-called Defenbach Trust.

Q. Perhaps you don't understand my question, Mr. Keeton. My question is where did the case turn on disputed questions of fact? I think you are telling me questions of law.

A. Well, in his Honor's decision, I think it hinged on a question of law. [69]

Q. That is what I meant, yes.

A. But we couldn't depend on that when we tried it.

Q. All right. And——

The Court: It runs in my mind—may I ask this question: Weren't there a good deal of background facts there which, we'll say at least, weren't admitted tending to show the intention of the trust settlor with reference to these vital documents?

(Testimony of Paul C. Keeton.)

A. There was.

The Court: All right, go ahead.

Q. (By Mr. Malott): And you tell this conversation with Mr. Etter the night before the case was tried, that you said you had a letter in your pocket relative to the payment of fees, and did you show him the letter? A. Mr. Defenbach?

Q. Yes.

A. No, he said it would do no good.

Q. Yes. And didn't he tell you at that time, in substance, that "We are not going to talk on any different basis than we have talked all the way through. We have had this agreement all the way through that we will wait until the end of the termination of this entire transaction, and thereupon you and I will both determine what fees should be requested and we will submit the matter to the creditors committee under the [70] assignment of November 16, 1954"?

A. No, he did not. He told me that he had no authority to make any agreement, the way he felt about it.

Q. And I think earlier you said on direct examination he had no objection to that type of agreement, but that he could not agree to it?

A. Yes.

Q. Would not agree to it?

A. In substance, that was it.

Q. Yes, neither could nor would agree to it?

A. And did not.

(Testimony of Paul C. Keeton.)

Q. And did not. Now, after that, did you make any written demands upon him for fee?

A. Yes. You have them in your file.

Q. I have Mr. Etter's letters, but——

A. No, I made no demands.

Q. Mr. Etter made all written demands?

A. Right.

Q. So you went to trial in the case, and did you ever ask Mr. Defenbach for reimbursement of your personal expenses in the conduct of this litigation?

A. No, I did not. After the trial was over, I never did ask him for any reimbursement. He offered at one time to pay Mr. Etter's expenses in the case, and that would have been about the 1st of March of 1956. [71]

Mr. McKevitt: Of what year? '56?

A. Yes.

Q. (By Mr. Malott): Do you have your office copy of your letter of June 6, 1956, carbon copy? I do not have the original of that, I have got a copy of it?

A. Oh, yes. Do I have my office copy?

Q. Or your carbon copy of that letter?

A. Sure.

Mr. Malott: Well, if there is no objection, I will offer that as a true copy of the original and anybody can correct it.

The Witness: No objection.

Mr. McKevitt: No objection.

The Court: That will be Respondent's Exhibit 1, then?

(Testimony of Paul C. Keeton.)

The Clerk: Yes, your Honor.

The Court: It is admitted.

(Whereupon, the said letter was admitted in evidence as Respondent's Exhibit D.)

[See pages 131-135.]

Mr. Malott: Then the next is a series of correspondence; a letter of March 26 from Etter and Connelly to Paul Keeton; a letter of April 11, 1956 to Ralph Defenbach; a letter of April 13, 1956 from Mr. Etter to Mr. Paul Keeton; and a letter [72] of June 1, 1956 from Mr. Etter to Mr. Defenbach.

Is there any objection to any of those?

The Witness: Well, ask Mr. McKevitt. I have none.

Mr. McKevitt: I haven't seen them.

Mr. Malott: That is just a series of correspondence.

The Court: What is the purpose of this, Mr. Malott?

Mr. Malott: Demands for payment of fees.

The Court: Well, is there any question but what he demanded the fee?

Mr. Malott: Well, the amounts of the demand and the suggestions——

Mr. Etter: Attempts at compromise. You can put it all in if you want, I don't care.

The Court: You mean he offers to settle for less?

Mr. Malott: Yes, offers of settlement, put it.

(Testimony of Paul C. Keeton.)

The Court: All right, tack it all together and put it in as Respondent's E.

Mr. McKevitt: You say there is no objection to that?

Mr. Etter: No, not a bit.

Mr. McKevitt: All right. I just want the Court to know I am aware——

Mr. Malott: I am not asking counsel to be bound by anything that is an offer of compromise. I am not—— [73]

The Court: All right, it is in, go ahead.

(Whereupon, the said correspondence was admitted in evidence as Respondent's Exhibit E.)

[See pages 135-144.]

Mr. McKevitt: I just wanted the Court and Mr. Etter to know that I had in mind no offer of compromise has any probative value of anything.

The Court: The Court has that in mind, of course.

Do you propose to cross examine this witness on offers that Mr. Etter made?

Mr. Malott: No, your Honor, but included in this are——

The Court: Is there some correspondence from this witness?

Mr. Malott: No, the other——

The Court: Well, let's keep on the track, for Heaven's sake. It is 4:30 now and don't throw anything in here that isn't material.

Go ahead.

(Testimony of Paul C. Keeton.)

Mr. Malott: Very well, I have no further questions.

Mr. McKevitt: I overlooked one or two questions.

Redirect Examination

Q. (By Mr. McKevitt): With reference to the time spent in legal research and [74] preparation of briefs prior to trial, and there was a memorandum brief submitted to Judge Driver that is in the file, is it not? A. Yes, it is.

Q. And can you approximate the number of hours that you put in in legal research in preparation?

A. After Judge Driver had heard the case, he asked for written briefs and I stayed up at Mr. Etter's house for five days while we worked full time on the brief, and then I came back for three more days while we both of us worked full time in preparing the brief, and I would say that we put in 100 hours or more in preparation of that brief.

Mr. McKevitt: That is all.

The Court: Mr. Malott.

Mr. Malott: Yes, I would like to ask him a question. I don't——

The Court: Well, go ahead.

Recross Examination

Q. (By Mr. Malott): This 100 hours of briefing, now what were the phases involved of wherein you spent such? That is the equivalent of—what did you figure a work week, 35 hour work week?

(Testimony of Paul C. Keeton.)

A. We worked a lot at nights, too. [75]

Q. 100 hours? What particular phases of the briefing?

A. We looked through the trust law day and day out, through the West indexes and through all the other indexes to find really the important case that this whole litigation hinged on, and finally at the end found it under some place where we never expected to look under—insurance—and we really spent all that time trying to find a case relevant and close to this one to submit to the Judge in our brief. If we had found the case first, it would not have taken us so long, but we found the case last.

Q. Then when you briefed the question under the subject of insurance and the assignability of insurance——

A. Finally found it there, and then were able to prepare the brief in about one more day by looking through there.

Q. When was that you were up there five days solid, Mr. Keeton?

A. Well, it would be right after October 18th.

Q. Did you stay in the hotel?

A. No, I stayed at Max's house.

Q. Oh, I see.

The Court: Is that all?

Mr. Malott: I have no further questions.

The Court: Any other questions? [76]

Mr. McKevitt: No, your Honor.

The Court: All right. Mr. Etter.

Mr. McKevitt: This examination of Mr. Etter won't exceed five minutes.

The Court: All right, go ahead.

R. MAX ETTER

a petitioner herein, called and sworn as a witness on his own behalf, was examined and testified as follows:

Direct Examination

Q. (By Mr. McKevitt): Your name is R. Max Etter and you are one of the petitioners in this case? A. That is correct.

Q. Admitted to practice in the State of Washington in the Federal Courts?

A. That is correct.

Q. Circuit Court of Appeals?

A. That is correct.

Q. Practicing how long?

A. About 21 years this year.

Q. Have had extensive experience in trial work in State and Federal Courts? A. Yes, sir.

Q. Appellate procedures in State and Federal Courts? [77] A. That is correct.

Q. You were at one time Assistant United States Attorney? A. Right.

The Court: I won't hold that against him.

Q. (By Mr. McKevitt): And Deputy Prosecuting Attorney? A. That is correct.

Q. Now, Mr. Etter, I want to ask you this one question particularly with reference to this conversation that Mr. Keeton spoke about in Spokane where the three of you were present and the fee

(Testimony of R. Max Etter.)

discussion was had. Will you tell the Court what took place in your recollection?

A. As close as I can remember—I talked with Mr. Malott at the recess—there is probably some question as to whether the conversation took place in the Ridpath or in my office or partly in both, and, as I recall, we discussed the case both places, over in my office and later when we went over to the Ridpath Hotel. The three of us were together at every time, so I would say that the discussion was either in the office or in the hotel or half in one and half in the other, as I recollect it.

I had talked, I think, with Mr. Defenbach at one time before. I just think that, although I may be in error. It might be that I corresponded with him through Mr. Keeton, I'm not sure of that, but [78] the definite one that I remember is the day prior to trial when we had a discussion about fees.

Q. The contents of that was what?

A. Beg your pardon?

Q. Give us that discussion.

A. Mr. Keeton came over and told me—I had asked Mr. Keeton to get some arrangement with Mr. Defenbach and I told him that I should like to have it on at least a partly retainer basis. Mr. Keeton came over and told me he had talked with Mr. Defenbach about it and hadn't reached any agreement and would I talk to Mr. Defenbach, or they both came over together, but in any event I had made a proposal on fees before and I repeated generally to Mr. Defenbach. I had suggested if

(Testimony of R. Max Etter.)

he wanted us to try this case, take it up on through appeal, that if he was willing to pay a retainer of $2,000, it would be acceptable through the courts on a prescribed fee of 20 or 30 per cent.

And he said that he was unable to pay any retainer at all, and during the course of the conversation we discussed the matter of retainers, and I said it was a practice, at least in Spokane as I understood it, to provide for a retainer in possibly three different grades; one of 25 per cent, one of 30 and one of 40. I explained to him our practice here on contingent [79] fees; that if there were advance payments made for costs and probably was settled without litigation, it would be 25 per cent, unless there was some provision made for some type of a retainer.

Mr. Defenbach explained to me that he wouldn't be able to pay anything, then or on appeal. In fact when I questioned him, he told me that if we should lose or if there was some necessity for appellate procedure, that he still couldn't pay anything and that it would be incumbent on the attorneys to assume all of the costs of the litigation and the costs of the appeal and all of the rest of it, which I knew to be in a considerable amount, assuming we had to go to the Appellate Court in San Francisco.

I didn't care for that arrangement, I'll be frank to say, and I said so, but I told him that as long as we were in the case, we would try it out on that basis. When I explained to him what these

(Testimony of R. Max Etter.)

matters of contingency were, he said as far as the proposals were concerned, they were reasonable, but that he could not agree to them and that was that. That was just about the situation. There was no objection. He didn't say, as Mr. Keeton said, exactly that he had no objection; he said as far as he was concerned, that appeared to be a reasonable basis, but [80] he was unable to agree to pay anything, that we would just have to take it and catch as catch can, as a matter of fact, and if we lost in the lower court and we wanted to go to the Appellate Court, that was up to us.

Q. You are speaking now about these percentage proposals?

A. That is correct, that is correct.

Q. Do I understand it is your testimony that he said he could see nothing objectionable to them?

A. That is substantially it.

Q. He considered it a reasonable fee under ordinary circumstances?

A. I shouldn't say I assumed it, but he had no objection and, in fact, we had a very pleasant conversation. He made his position clear that he couldn't pay and, although I was disappointed—I hate to take a case on that type arrangement—we agreed that we would do it, that was it.

Q. Was it your feeling at that time from your knowledge of the whole situation that unless there was a successful outcome to this suit here and above, that you and Mr. Keeton would be out your time and out of pocket?

(Testimony of R. Max Etter.)

A. Absolutely. And I might say this, and this is something that hasn't been mentioned, I had gone over upon the request of Mr. Keeton, I was told, evolved from a [81] request from Mr. Defenbach to talk to Clyde Rowan, one of opposing counsel, about a prospective settlement of the litigation and I had gone over to Mr. Rowan just a few days before this case and talked to him on a basis of possible settlement of this litigation, proposing or asking if he would consider somewhere between fifteen and twenty thousand dollars to his clients with the balance and remainder over to Mr. Defenbach, and Mr. Rowan told me that he would make a proposition to me, that he would give us between fifteen and twenty and he would keep the 46,000 and that was the best he would do, and which I conveyed back to Mr. Keeton and I assume he conveyed it back to Mr. Defenbach, and that was the posture of it when we had this discussion.

Q. In addition to the time spent in the actual trial of the case, Max, can you estimate for us the time that you personally put in in legal research that was required in various phases of this litigation?

A. There was a considerable amount of it, Mr. McKevitt. My docket probably illustrates, if you could just take it and look at it, the different work that was done in the pleadings. I am not going into that because his Honor wants to get around. But the problem here, I mean the actual crux upon which this case turned, [82] wasn't argument a

(Testimony of R. Max Etter.)

ıe time of the case at all, neither the opposition or we had, and I worked on it all that week with ır. Keeton and he went down to Idaho on other ork and I had found no solution to it at all. I ired the West Publishing Company, who pro-de a service, and set up the facts in this case and ked them if they could advise us of any leading ses or cases that had recently come into the pub-shing company that would bear on this subject. I eceived a telegram back from the West Publish-g Company citing the same cases that I had found at were on the trust end of it and that were on ıe matter of will construction, I think it was, and her matters of that kind, with a later letter from ıem also on phases of it that were not deter-inative of the controversy, and I wasn't satisfied ıd I felt that the Court was not satisfied in his vn mind during the argument as to how this case ıould be disposed of, and I was convinced that ıless we had something that was pretty definite, view of the situation we had where a trustee as trying to get $66,000 for a bunch of creditors ıd two youngsters were on the other side, if we dn't have something definite, we weren't going to t any money in the situation that presented itself.

Q. As against the two youngsters, the two chil-en? [83]

A. That is correct. The two children, I mean in situation like that, it would seem to me we would ve to be very definite, properly so, to get a judg-ent in a case like that.

(Testimony of R. Max Etter.)

So, finally, in going through the research, Mr. McKevitt, I went into insurance, and after being into the insurance for about, oh, 20 or 30 minutes, I came on to the case of Massachusetts vs. California Bank, I think in 187 Washington, which adopted a rule, by the way, which is considerably different than the rule that applies in New Jersey and some of the Eastern states. It is the contrary rule, although it is the majority rule, and we had had cases, I had found cases that looked bad for us because they took an opposite viewpoint from the right——

Q. Did you call those to Judge Driver's attention?

A. No, I didn't, I just called our own.

Q. Calling your own to the attention, you mean the 187 Washington, I assume?

A. That is correct.

Q. I assume you had in mind this Erie vs Tompkins?

A. That is correct, exactly right, because state law governs, jurisdiction having been established, so then it became an easy matter to wind up in the afternoon, get it dictated and sent to Judge Driver. We had [84] spent eight days and sent it the 9th day, or something like that. That was the conclusion of the work.

Q. Do you have an opinion, Mr. Etter, as to what a reasonable——

A. We later then submitted that to other coun

(Testimony of R. Max Etter.)

sel and let them use it, and the Appellate Court decided on the same case.

Q. You submitted it to the firm that took this case up? A. Oh, yes, we cooperated.

Q. The result of your labors?

A. That's right.

Q. Do you have an opinion as to the reasonable value of your services?

A. I feel the reasonable value was certainly 25 per cent of the recovery under those circumstances, yes.

Mr. McKevitt: You may examine.

Cross Examination

Q. (By Mr. Malott): Mr. Etter, in your letter of March 26th, part of Exhibit E, that was the first letter you had ever written to Mr. Defenbach on the matter of expressing an opinion—first, no, pardon me, that is the letter to Mr. Keeton.

A. That's right. [85]

Q. Was a copy of that sent to Mr. Defenbach?

A. Mr. Keeton advised me that he sent a copy of it to Mr. Defenbach.

Q. I see. And in that letter of the 26th, you make the expression, "It was your understanding that inasmuch as this case was taken on a contingent basis, that 20 per cent of the recovery was not excessive and was, in fact, an agreeable amount?"

A. Uh-huh.

Q. Now I ask, that wasn't by way of compromise, was it, that wasn't an offer of compromise;

(Testimony of R. Max Etter.)

that was an expression of your opinion of the reasonable amount at the time?

A. That and I think a reiteration of our original conversations that are indicated in my file of 20, 25, 30, 40 per cent, to him.

Q. Very well. And then you go on and ask that half of the 20 per cent now recovered, or about 6,000, be paid? A. That's right.

Q. Now, then, of course, in the same letter you suggested a definite — tried to button it up and asked for a definite agreement if you were to continue in the case? A. That's right. [86]

Q. And you were never able to reach——

A. Never able to reach an agreement, no.

Q. I believe you stated on your direct examination that was always your understanding, you would not be paid anything unless you won the case?

A. That's right.

Q. But I draw your attention to your letter of June 1st to Mr. Defenbach, just asking you to refresh your recollection; copy of your letter of April 13, 1956, I am drawing your attention to that, copy of which was sent to Mr. Defenbach and in part in which again you are writing on the subject of getting this fee matter straightened out, in which you say in part:

"It was my understanding that, in any event, we were to be paid a flat fee for this litigation; that is, the first Sun Life cases and the Macabees case."

A. Yes.

(Testimony of R. Max Etter.)

Q. Doesn't that bring anything to mind on the thing?

A. It brings to mind a flat fee basis on his arrangement, that what we were doing was a reasonable fee. There was no guarantee of any money at all. I think you can read later there that I think the flat guarantee to which we should be entitled on the fees should be $3,750. He hadn't guaranteed us anything, that is why I wrote the letter. [87]

Q. I ask you, in saying this, you say in part: 'It was my understanding that, in any event, we were to get a flat fee."

A. By way of a contingent basis, exactly. We were never guaranteed one penny.

Q. By flat fee, you didn't mean contingent fee?

A. I was referring there to his arrangement. He thought it was agreeable, he never agreed to pay anything.

Q. All right.

A. Later on, counsel who he employed took that same position with me, that he had never agreed to pay us a cent.

Q. (Reading): "I think that the flat guarantee to which we should be entitled for these cases and on the appeal should be $3,750, plus costs and expenses."

A. That's right, that is what I said. That is what I said. Doesn't say there that he had agreed to pay it.

Q. Oh, no. A. No.

(Testimony of R. Max Etter.)

Q. But you say it is your understanding that you would get a flat fee in any event.

Mr. Keeton: Win, lose, or draw. [88]

A. No, there was no understanding of that kind. If you construe it that way, you may do so, but there wasn't.

Q. I am just asking what you meant?

A. No, there wasn't——

Mr. McKevitt: May I inquire, if your Honor please, if this line of examination is being conducted for the purpose of showing that there had been a contract arrangement between these men and Defenbach?

Mr. Malott: Apparently, yes, I think that may well be. I am trying to find out what the agreement is. This is cross examination.

The Court: Is it your position that there was a contract for a flat fee?

Mr. Malott: No, your Honor, just taking the position that there was always an agreement, understanding made with Mr. Keeton that there would be a fee paid at the conclusion of the case; wait until they saw what had happened and then fix it accordingly.

Mr. McKevitt: I want to be clear if he is relying on these letters as constituting a contract. I am not clear on it, but if he is, I would object on the ground he hasn't pleaded it in his answer.

The Court: I don't think he is relying on a contract.

Mr. Malott: Thus far, Mr. McKevitt, I was just

(Testimony of R. Max Etter.)

89] cross examining, I haven't put on my own ase.

The Witness: You see, Mr. Malott, I never re-eived any answer to any of these letters to Mr.)efenbach. He never answered me at all.

Mr. Malott: I realize that.

The Court: Just a moment. I think I better onclude with these criminal cases that I have here. t least somebody ought to get some sleep tonight.

(A recess was taken in the hearing of the instant matter, after which the following proceedings were had:)

The Court: All right, proceed.

Mr. Etter: Are you going to be here tomorrow, udge?

The Court: Yes, for a while.

Mr. McKevitt: Mr. Ware, will you be sworn, lease?

MARCUS J. WARE

alled and sworn as a witness on behalf of the peti-oners, was examined and testified as follows:

Mr. McKevitt: Mr. Ware, of the Idaho Bar, our Honor.

The Court: Yes, all right.

Mr. McKevitt: And he has already read this ypothetical question, I have given a copy of it 0] to Mr. Malott, he has read it, so has Mr. mith, and your Honor has a copy.

Mr. Malott: Are you filing a copy?

Mr. McKevitt: I have given the Court a copy.

(Testimony of Marcus J. Ware.)

The Court: Yes. Is that acceptable to you, Mr. Malott?

Mr. Malott: Yes, that is acceptable.

The Court: Have you seen it?

Mr. Malott: Yes, I have, and I am not objecting to the question. Of course, I am not admitting that all of the foundation elements have been established, but the form of the question, no objection.

The Court: Very well.

Direct Examination

Q. (By Mr. McKevitt): Mr. Ware, how old are you? A. 52.

Q. You reside where?

A. Lewiston, Idaho.

Q. And you are a member of the bar of Idaho?

A. Yes, sir.

Q. Admitted to practice when?

A. June, 1927.

Q. Have you practiced in the State and Federa [91] courts in Idaho and the State courts in Wash ington? A. Yes, sir.

Q. General practice?

A. That is correct, general practice.

Q. Trial work, appellate work?

A. Yes, sir.

Q. Mr. Ware, have you been an officer of an bar associations down in Idaho?

A. Oh, originally when we had a county ba association and later of the Clearwater Bar Asso

Testimony of Marcus J. Ware.)

ation that consisted of five north central Idaho unties.

Q. Now, I have discussed this case with you and r. Keeton and Mr. Etter have also discussed it ith you, have they not, this litigation?

A. Yes, in a general way, yes.

Q. And I have submitted to you a hypothetical uestion which I presented to his Honor and you ave read that?

A. Yes, I have read that hypothetical question.

(The following is the hypothetical question rerred to hereinbefore:

"Q. Mr. ....., have you been in court durg the testimony that was given by Mr. Paul Keeon and Mr. Max Etter? In connection with the stimony given by those gentlemen, will you please ssume the following facts to be true: [92]

Immediately prior to September 23, 1953 one obert F. Weyen resided in Clarkston, Washingn, and for a considerable period of time prior said date had been engaged in logging busiess. He was a married man. His wife's name was ary Weyen and as their issue two children, Caroe and Daryl Weyen. On September 23, 1953, obert F. Weyen procured a decree of absolute vorce from his wife, Mary Weyen, in Asotin ounty, Washington. On that same date, he exeuted his last will and testament. A copy of said ill is a part of the records and files in this court Cause No. 1309. In that will, he made no provison for his children because, as he recited therein,

(Testimony of Marcus J. Ware.)

he had provided for them through insurance policies on his life. There was a further provision that if said policies lapsed or become void, the children were to receive $10,000.00 share and share alike. The residue of his estate, he bequeathed to one Emilie Mullins.

Contemporaneous with the execution of said will and on the 23rd day of September, 1953, [93] Robert Weyen executed a trust agreement, which agreement is a part of the files and records in Cause No. 1309. In this trust agreement, he designated E. J. Stanfill, an attorney at Clarkston, Washington, as trustee and as beneficiary in several life insurance policies on the life of the said Robert Weyen and issued by the Sun Life Assurance Company of Canada. The aggregate amount of said policies was $60,302.94, with double indemnity provisions in the event of accidental death. There were also two life insurance policies on his life with the Macabees Insurance Company in the aggregate sum of $5,832.00, which contained provisions for double indemnity in the event of accidental death. That among other things, said trust agreement of September 23, 1953, contained the following provision:

'The donor (Weyen) specifically reserves the right during the term of this trust to pledge any of such policies as collateral or to exercise the loan rights as provided in said policies and in the event the donor makes [94] application for such loans, it is hereby expressly understood that the signatur

(Testimony of Marcus J. Ware.)

of the trustee named herein shall not be required to join in the application for said loans.'

On the 16th day of November, 1954, Robert Weyen executed a document entitled 'Assignment to Trustee for Benefit of Creditors,' which document is a part of the files and records in Cause No. 1309. In said instrument, the defendant in this action, Ralph B. Defenbach, was designated as 'trustee'. This assignment contained, among other things, the following provision:

'The Party of the First Part has the following policies of life insurance, to-wit:

Policy No. 1937383 — The Macabees, Detroit, Mich.—$3,000.00; 1852251—Sun Life Assurance Co. of Canada—$2,000.00; 1952847—Sun Life Assurance Co. of Canada—$5,000.00; 1710519—Sun Life Assurance Co. of Canada—$1,000.00; 1919863—Sun Life Assurance Co. of Canada—$3,000.00; 1755413—Sun Life Assurance Co. of Canada—$1,000.00; 1861701—Sun Life Assurance Co. of Canada—[95] $10,000.00; 1861700 — Sun Life Assurance Co. of Canada—$10,000.00; OW-OON50387247M—Mutual Benefit H&A Assn., Omaha—$2,500.00; PPA 100-950352M—Mutual Benefit H&A Assn., Omaha—$5,000.00.

'That the said Party of the First Part, at the time of executing this assignment, has prepared the necessary documents to have Party of the Second Part herein made his beneficiary for the benefit of the creditors joining in this assignment in the event of his death; and Party of the First Part shall

(Testimony of Marcus J. Ware.)

immediately deliver said policies of life insurance to Party of the Second Part for forwarding to the Home Offices of the companies issuing said policies so that appropriate endorsements may be attached thereto showing Party of the Second Part as beneficiary under the terms of said policies.'

Prior to September 23, 1953 (the date of the execution of what we will call 'the Stanfill trust'), Robert Weyen had [96] suffered numerous and serious financial reverses in his logging business. His financial condition grew steadily worse. The federal government and the State of Idaho had filed tax liens against him on the following dates: two on September 30, 1954; one July 16, 1954; one December 22, 1954; one April 6, 1955; one May 13, 1955; and one August 24, 1955; and one February 10, 1956. That said tax liens totaled $38,318.38.

The serious financial condition of Robert Weyen resulted in the execution of the assignment for the benefit of creditors dated November 16, 1954.

Robert Weyen came to his death accidentally on April 16, 1955. At that time, the defendant in this action as trustee had in his possession little, if any, assets for distribution to the creditors of Robert Weyen, secured and unsecured, the amount of his indebtedness to them approximating the sum of $225,000.00, except for the right, if any, of Mr Defenbach, as trustee, to recover for the benefit of said creditors the proceeds [97] of the insurance policies already referred to.

(Testimony of Marcus J. Ware.)

Immediately following the death of Robert Weyen, his Mother legally contested the rights of Ralph B. Defenbach, as trustee, to a portion of the proceeds of said policies; his ex-wife, Mary Weyen, similarly contested the right of Mr. Defenbach to any of the proceeds of the insurance policies; the children of Robert F. Weyen, through legal representation, contested the right of Ralph B. Defenbach to the proceeds of said policies; the several claims of these parties referred specifically to amounts due under policies of life insurance with double indemnity from Sun Life Assurance Company of Canada and the Macabees Insurance Company. Parenthetically and with reference to two accident policies for accidental death issued to Robert F. Weyen by the Mutual Benefit Association of Omaha, totalling $7500.00, which are not actually in issue in this case, nevertheless through the efforts of Attorney Paul C. Keeton, one of the petitioners in this case, said amounts on said 98] policies were paid to the defendant, Ralph B. Defenbach as trustee. In connection with this specific sum of $7500.00, the defendant, Ralph B. Defenbach, refused to pay out any moneys from said fund for any purpose until and if and when his rights as trustee thereto were legally established. It was the opinion of said trustee, Ralph B. Defenbach, concurred in by petitioner Paul C. Keeton, that said sum of $7500.00 was subject to the tax liens which have heretofore been referred to, and in addition that the Federal Government under Para-

(Testimony of Marcus J. Ware.)

graph 7, Part B, of the Trust Agreement of November 16, 1954, was second in priority to payment of labor liens and that, therefore, any balance of funds in his hands would be subject to the claims of the Tax Departments of the United States Government and the State of Idaho.

That because of the conflicting claims above referred to, the Sun Life Assurance Company of Canada and the Macabees Insurance Company caused to be filed in the above-entitled Court separate actions in interpleader wherein the following parties were [99] joined as defendants:

Mary Weyen (ex-wife)

Elfrieda May (Mother)

E. J. Stanfill as Trustee for the minor children of the deceased, Robert F. Weyen

Ralph B. Defenbach as Trustee for the creditors (under Assignment to Trustee for Benefit of Creditors, dated November 16, 1954).

The action instituted by the Sun Life Assurance Company was first filed; the action filed by the Macabees was filed thereafter.

That defendant trustee, Ralph B. Defenbach, consulted with and retained petitioner Paul C. Keeton to represent him in the litigation just mentioned.

That said petitioner, Paul C. Keeton, informed defendant Ralph B. Defenbach that since said actions were pending in the Federal Court in the State of Washington that it would be necessary for said petitioner, Paul C. Keeton, to associate with

Testimony of Marcus J. Ware.)
im an attorney having an office in the District herein said action was pending; such advice be- ng given by petitioner, Paul C. Keeton, to Ralph . Defenbach, Trustee, pursuant to Rules of the istrict Court of [100] the United States for the astern District of Washington, being subdivision g) of Rule 1 thereof, reading as follows:

'(g) Office Address within the State—Should a arty in any cause not appear in person, and should s attorney not maintain an office within this tate, there shall be joined of record in such ap- earance, or within ten (10) days thereafter, an ssociate attorney having an office in this district nd admitted to practice in this court.'

Petitioner, Paul C. Keeton, advised defendant alph B. Defenbach that because of the importance such litigation it was not only necessary that ere be a formal compliance with said rule, but at in order that the interests of the defendant alph B. Defenbach, Trustee, be properly pro- cted there be associated in said case a reputable nd experienced Spokane trial lawyer, familiar th Federal Court procedure in the Ninth Circuit. o this recommendation on the part [101] of peti- oner, Paul C. Keeton, the defendant Ralph B. efenbach agreed.

That the litigation above referred to involved the fing of pleadings such as motions, stipulations, swers and other documents as listed in the files nd records of this Court.

That in the interpleader actions instituted by the

(Testimony of Marcus J. Ware.)

Sun Life Assurance Company of Canada and the Macabees Insurance Company, said plaintiffs were represented by Messrs. Graves, Kizer, Greenough & Gaiser, of Spokane, Washington; S. Dean Arnold Attorney at Clarkston, Washington, appeared as attorney for the defendants, Mary P. Weyen, individually and as Guardian of Daryl Weyen and Carolyn Weyen, minors, and E. J. Stanfill, as Trustee and E. J. Stanfill, as Executor of the Estate of Robert Francis Weyen, Deceased; C. C. Rowan, of Spokane, Washington, appeared as attorney for defendant, Elfrieda May.

That each of the defendants in said interpleader actions claimed a part and/or all of the proceeds of the said life insurance [102] policies which have been deposited by said insurance companies into the registry of the above entitled Court.

That immediately following the death of the said Robert F. Weyen, the Internal Revenue Department of the Federal Government had advised the defendant, Ralph B. Defenbach, that it intended to audit the income tax of Robert F. Weyen for a period of several years prior to said death and had ordered impounded all of his records. That the said Ralph B. Defenbach rented an office in the Porter Block in Lewiston, Idaho, on or about May 1, 1955, being the same building occupied by the petitioner, Paul C. Keeton, in which office were placed all of the records of the deceased, Robert F. Weyen, which might pertain to or have any bearing upon the tax obligations, if any, of Robert

Testimony of Marcus J. Ware.)

. Weyen; that at all times from the inception of he actions instituted by the insurance companies he defendant, Ralph B. Defenbach, advised petiioner, Paul C. Keeton, that he did not feel that e was in any wise authorized or empowered to xpend any part of the proceeds [103] of said life nsurance policies which might come into his hands r for any purposes whatsoever until if and when ne claims of the Federal Government, the State f Idaho and secured common creditors of said Robert F. Weyen have been in whole or in part atisfied. That it was fully understood by the deendant, Ralph B. Defenbach, that the compensaon, if any, for his attorneys, Paul C. Keeton and . Max Etter, and compensation for himself as rustee under the Assignment of November 16, 954, would be completely dependent upon the outome of the action above referred to, viz: that there ould have to be a judgment of the above entitled ourt, final after a possible appeal in favor of the efendant, Ralph B. Defenbach as Trustee.

That in the proper representation of said defendnt, Ralph B. Defenbach, in said action it was and ecame necessary for petitioners, Paul C. Keeton nd R. Max Etter, to extensively brief the many omplicated legal questions involved, among which as the contention of counsel representing the 104] other defendants that the provisions of the rust Agreement of September 23, 1953, were irrepcable in nature, which position, if sustained, ould result in the entire fund due out of the

(Testimony of Marcus J. Ware.)

proceeds of the said insurance policies being distributed among parties other than Ralph B. Defenbach as Trustee. The proper conduct of such litigation also involved numerous conferences between petitioners and defendant, Ralph B. Defenbach, the conduct of a great deal of correspondence, conferences in Spokane between Paul C. Keeton and R. Max Etter and Ralph B. Defenbach.

Said actions came on for trial before the Honorable Sam M. Driver, Judge of the above entitled Court on or about October 18, 1955. After reception of the evidence introduced by all the parties involved, written briefs on behalf of Ralph B. Defenbach were submitted by your petitioners and by opposing counsel. The legal research and preparation of said brief required petitioners to expend of their time at least 100 hours. The legal problem involved resolved itself [105] into a question of whether or not the Stanfill Trust of September 23, 1953, was irrevocable, thus placing any funds derived from said insurance policies beyond the power and control of Ralph B. Defenbach as Trustee for the benefit of creditors under Assignment to Trustee for Benefit of Creditors, dated November 16, 1954.

This legal question, through the efforts of petitioners, Paul C. Keeton and R. Max Etter, was resolved in favor of Ralph B. Defenbach by the Honorable Sam M. Driver, Judge of the above entitled Court, in a six-page opinion filed December 15, 1955.

(Testimony of Marcus J. Ware.)

Subsequent to the filing of said opinion and the entry of judgment thereon, E. J. Stanfill, as Trustee, and Elfrieda May, as appellants, perfected an appeal to the United States Court of Appeals for the Ninth Circuit, wherein defendant, Ralph B. Defenbach, as Trustee, was named as appellee.

Because of a dispute between Paul C. Keeton and R. Max Etter and Ralph B. Defenbach as to the compensation Paul C. Keeton and R. Max Etter were entitled to as the [106] result of their efforts in procuring the judgment above referred to in the total sum of $66,134.94, Paul C. Keeton and R. Max Etter withdrew from further participation in the litigation and said appeal on behalf of Stanfill as Trustee and Elfrieda May was conducted by other attorneys.

The judgment of the District Court in favor of Ralph B. Defenbach as Trustee was affirmed by the Court of Appeals on January 4, 1957, and a study of that opinion clearly indicates that the Assignment to Trustee for Benefit of Creditors, dated November 16, 1954, and drawn by the petitioner, Paul C. Keeton, was in every respect a valid instrument, even though its validity had been severely attacked throughout the entire course of the litigation in both the District Court and the Court of Appeals.

Furthermore, the extensive legal research conducted by Paul C. Keeton and R. Max Etter in the District Court was turned over by said petitioners to Messrs. Paine, Lowe, Coffin & Herman

(Testimony of Marcus J. Ware.)

for their assistance in sustaining the judgment of the District Court. [107]

Do you have an opinion as to the reasonable value of the services rendered by Mr. Keeton and Mr. Etter?

What is that opinion?"

Q. (By Mr. McKevitt): Having in mind the testimony, and I assume you have been in court during the entire testimony of Mr. Keeton and Mr. Etter? A. That is correct.

Q. Having in mind the testimony they have given in and in connection with the hypothetical question with which you are familiar, do you have an opinion as to what would be a reasonable fee to be allowed to these gentlemen for services rendered? A. Yes, I have.

Q. Do you have such an opinion?

A. I have an opinion.

Q. Will you state what it is?

A. My opinion is that a reasonable fee would be one-third of the amount recovered.

Q. In arriving at that opinion, I will inquire if you had occasion to make a study of your own bar schedules, the bar schedule of Asotin County and the bar schedule of Spokane County? [108]

A. Yes, I am familiar with the bar schedules.

Mr. McKevitt: You may inquire.

Cross Examination

Q. (By Mr. Malott): You say your idea is one-third of the amount recovered?

(Testimony of Marcus J. Ware.)

A. I am saying I would consider that a reasonable fee.

Q. What would be your notion of a reasonable fee in the matter if it were to be carried on to the Circuit Court of Appeals?

Mr. McKevitt: That is objected to as incompetent, immaterial, and irrelevant, because we didn't conduct the appeal.

The Court: Overruled, he may answer it.

Q. (By Mr. Malott): What would be your notion in the thing?

A. I would say a fee measured by 40 per cent of the amount recovered——

Q. Your breakdown——

A. ——in my opinion.

Q. Your breakdown, then, would be about $22,000 contingent fee for the case in the lower court and about 7 per cent more, about $4,500 more, contingent for covering the Circuit Court of Appeals?

A. Mr. Malott, you may be in a field that I should not [109] testify in. I have not had any connection with appeals to the Ninth Circuit Court of Appeals or any Circuit Federal Court, although I worked on one case years ago for an attorney in Lewiston in connection with that.

Q. You have got a pretty good experience in trials before District Courts, I mean?

A. Yes, sir, in my own state and some in certain Washington counties, and appellate work in Washington and in conjunction with Washington lawyers.

(Testimony of Marcus J. Ware.)

Q. Is it your opinion that all cases that are handled on a contingent basis should be handled on a basis of one-third for the trial in the lower court?

A. I consider such a reasonable fee.

Q. Irrespective of the question, whether it turns on questions of fact or of law, for the time involved in the trial?

A. I think it would depend upon the nature and substance of the action and the disputed nature of the controversy and the problems involved, and I might say in arriving at my opinion I have considered—I am familiar with the pleadings in the cases and the decision of the Court, the briefs filed. I have examined them.

Q. You are aware of the fact and you are of the opinion that the case turned virtually exclusively on questions [110] of law, rather than fact, are you not?

A. Except that to the extent that facts were background in the interpretation of the instruments involved——

Q. Yes.

A. ——which would involve the presentation of a factual question, I suppose, from the standpoint of parties on both sides of the controversy.

Q. Now may I ask you this: If we can assume in this case that the trustee, the respondent here, had around $7,000 or $7,500 which would have been available for expenses of litigation, and that there was no specific agreement, I would ask in your

(Testimony of Marcus J. Ware.)

)pinion what would be a reasonable fee under those circumstances?

A. I don't quite understand your question.

Q. Well, that was poorly expressed, let me just sk you this: Assuming that the client has avail-ble for conducting litigation $2,500 or $3,500, vhich he is willing to pay on account and may ventually be able to pay on account, what do you hink would be a reasonable fee?

A. Are you speaking of before or after the rial?

Q. Well, he is a solvent client, is what I am aying. You have got a client that is solvent up to 7,500; that he is solvent and has money on which o pay an attorney's fee; what would be a reason-ble attorney's [111] fee to charge him on a case ke that for trying these cases?

A. You are assuming facts that aren't in evi-ence here as far as this case at the present time.

Q. That is correct.

Mr. McKevitt: Well, I object to it as not being proper basis for assuming that. It contemplates acts that counsel might introduce in evidence vhich would probably make it proper cross exami-ation.

A. It is difficult for me to answer it in the ense that so far there has been no indication that here were any free funds. It would look like the ssumption of facts outside of the case.

Q. (By Mr. Malott): Will you endeavor to nake an assumption, however?

(Testimony of Marcus J. Ware.)

A. You are talking about a flat fee?

Q. I am talking about a fee, a way to charge a client. You are trying a case and there is no agreement, there is no agreement whatsoever. We are apparently agreed on that. In this case, there was no agreement. You are assuming in your answer that there was no agreement.

A. I certainly wouldn't consider $2,500 or $3,500 adequate.

Q. Let me ask you this: You have assumed in this case [112] that there was no agreement for the payment of an attorney's fee, haven't you, in the answer to the hypothetical question?

A. In answering the hypothetical question, I have assumed that there was no agreement for a fixed or flat or prearranged fee; that the petitioners here, that the attorneys, were employed on a basis that if there was no recovery, there would be no fee and that they would be out their costs. That is as I understand the hypothetical question.

Q. That is the way I understand it.

A. Now I am asked, as I understand you—I understand, I am not arguing—I am asked what would be a reasonable fee if a client had $2,500 or $3,500?

Q. Yes.

A. Available to pay toward attorney's fees?

Q. Yes.

A. Well, all I can say is I don't think that sum would be a reasonable sum.

Q. That is, as a retainer and how much more?

(Testimony of Marcus J. Ware.)

f you had a cushion, a guarantee, that you would ventually receive a figure of $2,500——

A. Now, would this $2,500 cover costs or would osts——

Q. Let's call it $2,000 plus costs of up to $500 or the trial in the lower court. [113]

A. Oh, I would assume that a person would be ntitled to an additional fee of equivalent to 15 or 0 per cent. I mean, a fee based on the amount of ne recovery of some 15 or 20 per cent in addition o a retainer.

Q. In other words, if it is a $60,000 recovery, ou would say a retainer of $2,000 plus nine to hirteen thousand dollars more, on a $60,000 recovery? I am just rounding it out.

A. Well, I am not——

The Court: That is mathematical.

Mr. Malott: Yes, that is mathematical.

A. I am a poor accountant.

Mr. McKevitt: I can't follow that myself.

Mr. Malott: All right, I have no further questions.

Mr. McKevitt: That is all.

(Witness excused.)

The Court: Mr. Smith.

DEL CARY SMITH

called and sworn as a witness on behalf of the petitioners, was examined and testified as follows

Direct Examination

Q. (By Mr. McKevitt): You name is Del Cary Smith, Jr.? [114] A. Del Cary Smith.

Q. You reside in Spokane?

A. I reside in Spokane and have all my life.

Q. Practicing attorney? A. I am.

Q. Admitted to practice when?

A. Over 30 years ago.

Q. Practice in the State and Federal Courts of Washington and Idaho both?

A. I am admitted to the Federal Courts of Washington, Idaho, California, and to the Circuit Court.

Q. Were you at one time a member of the Prosecutor's staff of Spokane County?

A. Yes, I succeeded Judge Driver when he went to Wenatchee. I won't say I took his place, I succeeded him.

Q. And in addition to that——

Mr. McKevitt: This is leading, Tom, but it is a fact——

Q. ——you have been President of the Spokane County Bar, the State Bar, and a member of the Board of Governors? A. That is true.

Q. You have read this hypothetical question?

A. I have read the hypothetical question and listened to the background of the case as detailed in the sworn testimony today. [115]

(Testimony of Del Cary Smith.)

Q. Do you have an opinion as to the reasonable value of the services rendered by Mr. Keeton and Mr. Etter? A. I have.

Q. What is it?

A. I would feel that they would be entitled to a fee of not less than 25 per cent for their services.

Mr. McKevitt: You may examine.

Mr. Malott: I have no questions.

(Witness excused.)

Mr. McKevitt: The petitioners rest, your Honor.

The Court: All right.

Mr. Malott: Mr. Defenbach.

RALPH B. DEFENBACH

defendant herein, called and sworn as a witness on his own behalf, was examined and testified as follows:

Direct Examination

Q. (By Mr. Malott): You reside where, Mr. Defenbach? A. Lewiston, Idaho.

Q. Your occupation?

A. Public accountant.

Q. How long have you been so engaged?

A. Oh, 30 years. [116]

Q. And during his lifetime you became assignee of this assignment for benefit of creditors dated November 16, 1954, did you not?

A. That is right.

Q. And following that time you served as such assignee during Mr. Weyen's lifetime?

A. Yes.

(Testimony of Ralph B. Defenbach.)

Q. And then he was killed in an automobile accident in April of '55, was he not?

A. April 16th.

Q. April 16, 1955, following which you continued as assignee for the benefit of creditors?

A. Yes.

Q. Now, you have heard Mr. Keeton's story of the circumstances of the assignment; that he was a logger and got tangled up in his operations and that you became assignee for the benefit of the creditors, and that there were about $140,000 in one class of creditors and about $60,000 of another class of creditors; is that substantially correct?

A. Yes, that is the best information I would have.

Q. Now, Mr. Defenbach, Mr. Keeton, as I understand it, had been Mr. Weyen's attorney during his lifetime? A. Off and on, yes.

Q. Off and on. Following that, when did you engage [117] Mr. Keeton as your attorney in this matter? I mean, as attorney after Mr. Weyen's death, did you employ Mr. Keeton?

A. Very shortly afterwards.

Q. Yes. And was there any discussion at that time regarding fee or compensation which he was to receive for his services and, if so, what was said?

A. Yes, there was a discussion at that time and a discussion several other times with respect to any fee that he might charge, any fee that I might charge.

(Testimony of Ralph B. Defenbach.)

Q. Will you fix the time and place where these discussions took place?

A. Oh, I couldn't — the first one was shortly after April 16, 1955. The other conversations were in Mr. Keeton's office. We were busily engaged in a great many details of this work. He agreed and I agreed, it was a mutual agreement, that we would impose no fees for ourselves until this entire matter was taken into the District Court in Nez Perce County and finally adjudged closed.

Q. Did you discuss the proposition that under this assignment, that you were going to wind it up or the final windup would be under court supervision or under court approval?

A. Yes, that was discussed. Mr. Keeton mentioned a [118] conference with certain attorneys and I am sure that the matter was discussed at that place and at that time. There were a great many questions as to whether the trustee would survive Mr. Weyen and as to whether the committee would survive Mr. Weyen, so all——

Q. By that you mean there was a question as to whether this agreement of November 16, 1954 would continue after Weyen's death?

A. That is right.

Q. Yes.

A. And the attorneys were the attorneys Mr. Keeton mentioned, Mr. Russell Randall, Mr. Paul Hyatt of Lewiston, and the conclusion was and the agreement was that——

Mr. McKevitt: I object to his stating what the

(Testimony of Ralph B. Defenbach.)

conclusion and agreement was. What was said by either——

The Court: Yes, I think that's right. What was said by the parties there?

A. Mr. Keeton said that on account of his knowledge of Mr. Weyen's affairs, he felt that he was competent to act as attorney in this trust and represent the trustee, and that if I would work in conjunction with this committee, that he thought this matter could be brought to a successful conclusion.

Mr. McKevitt: May I make an inquiry? Are you [119] talking about now about the discussions with Mr. Keeton prior to Mr. Weyen's death or after?

A. No, after his death.

Mr. McKevitt: After his death.

A. After his death.

Q. (By Mr. Malott): Did Mr. Keeton express any of the reasons why he was willing to go into such an arrangement? A. Yes.

Q. Why did he say he proposed to handle it in that fashion?

A. One reason was that he was thoroughly familiar with Mr. Weyen's affairs; that he felt a personal responsibility to Mr. Weyen in this matter; that he was the author of the instrument and felt responsibility in it and that he was also a creditor of the creditors' pool.

Q. He was a creditor? How big a creditor did he tell you he was?

A. My memory, he said $5,000.

(Testimony of Ralph B. Defenbach.)

Mr. Keeton: Oh.

A. He is recited as a creditor in the agreement here for nineteen hundred and some odd dollars.

Q. Following that you received this $7,500 from the Mutual Benefit Health and Accident Association? A. Yes. [120]

The Court: He received how much?

Mr. Malott: $7,500, approximately $7,500.

A. It was more than that, it was closer to $8,700.

Q. $8,700. Now, with reference to the tax liens that were claimed by the various taxing agencies, did you have conversations with the Director of Internal Revenue as to whether you could conduct litigation and make reasonable expenditures in prosecuting this litigation?

Mr. McKevitt: Objected to as hearsay. As I understand the discussions, oral discussions?

Mr. Malott: Oral discussions.

Mr. McKevitt: I object to that.

Mr. Malott: It can be answered yes or no, not what was said.

A. Not with the Director, with his representatives, yes.

Q. Prior to the time that this litigation was commenced, did you and Mr. Keeton discuss with each other as to whether you could make reasonable expenditures in conducting this litigation?

A. Yes.

Q. And what was said by you and Mr. Keeton as to whether expenditures could be made?

(Testimony of Ralph B. Defenbach.)

Mr. McKevitt: I wish you would fix the time and place. [121]

Q. (By Mr. Malott): Well, if you can fix the time and place as best you can.

A. Oh, May, June, July of 1955.

Q. What conclusion did you and Mr. Keeton come to as to whether that money, whether the $8,500, could be used for expenses for administering the estate?

Mr. McKevitt: Object to the form of the question. Detail the conversation.

The Court: Yes, I think that calls for a conclusion as to what conclusion they came to. I will sustain the objection. Tell what was said, what discussion.

Q. (By Mr. Malott): What was said by you and Mr. Keeton?

A. Well, I told Mr. Keeton my opinion was that this money was practically dedicated to the purpose of protecting this estate.

Q. And at that time had you had conference with these lien claimants, these taxing—— At the time you made that statement, had you had conversations with the taxing agencies? A. Yes

Q. And did you repeat to him what you had been told by the taxing agent, by the representatives of the Department of Internal Revenue?

A. I am quite certain that I did.

Q. What, in substance, did you tell him? [122]

A. I told him that I had talked with Mr. Ber

(Testimony of Ralph B. Defenbach.)

Heath, who was the Collector of the Northern District of Idaho of Internal Revenue——

Mr. McKevitt: Heath?

A. Heath. That I told Mr. Heath that I had $8,700 in round numbers on deposit in the bank; that I was conserving that money for administrative expenses of the trust, and asked him if his office had any intention of placing a lien on the money or preventing me from doing that. At first he said he was not qualified to give me an answer, so he contacted the attorney for the Internal Revenue Division in Boise and then reported back to me that while they didn't want to commit themselves to writing in the matter, that I could rest assured that they would not interfere with me, because they had a claim at stake and I was the only one that could protect their claim.

The Court: Is this all that you told Mr. Keeton of what the Internal Revenue people told you?

A. Yes, I told him that.

The Court: You related this all to Mr. Keeton is just the words you are telling it to me now?

A. In substance, yes, your Honor.

The Court: All right.

Q. (By Mr. Malott): How many conferences did you have with [123] Mr. Collister, the attorney Collister?

A. Collister is the Deputy United States Attorney. I had probably—my best recollection is four, possibly five conferences with Mr. Heath and one conference with Mr. Collister.

(Testimony of Ralph B. Defenbach.)

The Court: These were all out of the presence of your attorney? Your attorney never went with you, Mr. Keeton, in any of these conferences?

A. That is right.

The Court: All right.

Q. (By Mr. Malott): And did you, in substance, *rely* to Mr. Keeton the conversations that you had—— A. Yes.

Q. ——with the tax man or the attorney?

A. Yes.

Q. Now, when was the first time you met Mr. Etter?

A. In his office at 9 o'clock in the morning on the day of this hearing. I think it was the 18th day of October, 1955.

Q. Did you talk about the merits of the case itself?

A. We discussed some matters with respect to my testimony and that is all.

Q. I see. Was there any discussion in your presence regarding fee? A. None. [124]

Q. Did Mr. Keeton on or about that time, or or about the 18th of October, make any suggestion to you regarding what figure should be charged in this case, or these cases, I should say?

A. Mr. Keeton met me in the lobby of the Richpath Hotel on the morning of the hearing, approximately 7:30 in the morning, and we talked about a number of matters and then he said this he says, my best memory of it, "That we feel in this action that we should have a guarantee o

(Testimony of Ralph B. Defenbach.)

$7,500, win, lose, or draw, and $15,000 in case we win."

Q. What did you say to that?

A. And I said, "Well, Mr. Keeton, you know that I cannot make any such an agreement with you." I meant by that——

The Court: Well, I don't think the witness should explain what he meant by that. What he said, it is what he said, not what he meant, his secret mind.

Q. (By Mr. Malott): Was any reference made to prior fee arrangements you had?

A. As to prior——

Q. Well, I mean what else was said? Just finish the conversation if you can. Keeton said that he wanted $7,500 base or a total of $15,000 if he won, and you said you couldn't agree to that, and did you tell him why? [125]

A. My memory is that I said "My committee is not present."

Q. Did Mr. Etter on that day, at that time—well, I have asked you that already. You have said he did not discuss fee?

A. He did not discuss fee.

Q. And when was the first time you heard from Mr. Etter on the subject of fees, by which I mean the first time——

A. These letters that are in evidence, on those dates.

Q. You refer to the letters of March——

(Testimony of Ralph B. Defenbach.)

The Court: Didn't you ask him what the conversation was?

Mr. Malott: I beg your pardon?

The Court: Didn't you ask him what was said by Mr. Etter?

Mr. McKevitt: Yes, he did.

Mr. Malott: No, I asked him when was the first time he ever heard from Mr. Etter.

The Court: Oh.

Mr. Malott: When was the first time he heard from Mr. Etter.

The Court: Well, show him the letters if it will refresh his memory.

A. Yes, those are the letters. [126]

Q. (By Mr. Malott): You have seen the letters which are in evidence as Respondent's E. Did you write any letters in reply to that? A. No.

Q. Did you write any letters to Mr. Keeton?

A. No.

Q. Did you talk to Mr. Keeton? A. Yes.

Q. Where did you have your conversations with Mr. Keeton? A. In his office.

Q. In Lewiston? A. Yes.

Mr. McKevitt: Fix the date of these conversations.

Mr. Malott: Yes, I am going to.

Q. Well, the first letter, I believe——

The Court: Well, what has the letter from Etter got to do with the date of his conversation with Mr. Keeton?

Mr. Malott: Following demand.

(Testimony of Ralph B. Defenbach.)

The Court: Beg pardon?

Mr. Malott: Following demand made by Mr. Etter.

The Court: I think the question now is the date of his conversation with Mr. Keeton as near as he remembers.

Mr. Malott: I am trying to get him to take it up with that date. [127]

The Court: Show him the letter, then, and let him refresh his memory.

Mr. Mallot: Very well, your Honor.

The Court: Don't read them, just look at them, if you can, and figure out when you talked to Mr. Keeton at his office in Lewiston.

A. On or about the 1st of April—on or about the 12th of April.

Mr. McKevitt: '56?

A. '56. And on or about the 3rd of June, 1956.

Q. (By Mr. Malott): What was said by Mr. Keeton at that time?

The Court: At which time? He has detailed three meetings.

Q. (By Mr. Malott): Yes, on or about the 1st of April?

A. I think all that I talked with Mr. Keeton about on the first meeting was that I felt that he should adhere to his agreement with me that he would not assess any fees with respect to his own services until this action was completed.

Q. Did you suggest to him that you make a

(Testimony of Ralph B. Defenbach.)

separate settlement with Mr. Etter for Mr. Etter's services?

A. Yes, I always figured that was his responsibility.

Q. I know——

Mr. McKevitt: Object to that, if your Honor please. [128]

The Court: What is that?

Mr. McKevitt: I object to his volunteering he always considered that.

The Court: Yes, that will be stricken and the Court will disregard it.

A. I met with my committee with respect to this letter of Mr. Etter's that was addressed to me and——

The Court: What you did or said with your committee is not admissible here. In my view, anyway, that would be pure hearsay, would it not?

Mr. Malott: Oh, yes, that is correct.

The Court: Committee members are not here to testify.

A. Following the meeting—may I say what I said to them?

The Court: No, that is hearsay. If you wanted to have the committee members testify, you should have brought them here as witnesses.

A. Following the meeting with my committee, I went to Mr. Keeton's office and I said, "It looks to me as if you got in pretty deep in this matter with Mr. Etter. I feel, and the committee has told me that they feel——"

(Testimony of Ralph B. Defenbach.)

The Court: That is not proper.

A. "——we are acting in good faith."

The Court: I thought I told you it was hearsay what the committee told you, so please refrain from detailing it. [129]

Mr. Malott: Your Honor, I understand the witness is reporting a report.

The Court: I thought he was saying what his committee told him. If this is what you told Mr. Keeton, of course, you can always get it in under the guise of what you told Mr. Keeton.

Mr. McKevitt: That is what he is doing.

A. All right, I will leave the committee out.

The Court: Well, go ahead, whatever you told Mr. Keeton in detail what the committee told you, that is what you told Keeton, that is all right.

A. I told Mr. Keeton, I submitted—I tendered to Mr. Keeton $3,750 to pay Mr. Etter's charge.

Mr. McKevitt: Now fix the date of that.

A. That would be a conference held with Mr. Keeton very shortly after April the 13th?

Mr. McKevitt: What year?

A. Of 1956. I told Mr. Keeton that I had read to this letter that was addressed to him by Mr. Etter that Mr. Etter considered his services worth $3,700 in this case, and I tendered payment of $3,750 to Mr. Keeton to send to Mr. Etter. Mr. Keeton refused to accept it and then said that he was going to withdraw as my attorney from the action. [130]

The Court: Was that a tender that you made

(Testimony of Ralph B. Defenbach.)

in full payment of Mr. Etter's services in the trial court and for the appellate court, too, is that what you were doing?

A. It was a tender made by me to Mr. Keeton——

The Court: To pay Mr. Etter?

A. To pay Mr. Etter.

The Court: To pay him in full?

A. Yes, sir.

The Court: All right, go ahead.

Q. (By Mr. Malott): For clarification, that was solely for Mr. Etter, wasn't it?

A. Solely for Mr. Etter.

Q. For the services rendered up to that time and, of course, at that time he had completed all of the work in the lower court, hadn't he?

A. Yes.

Mr. Malott: I think that is all.

Cross Examination

Q. (By Mr. McKevitt): I am going to ask you this just blankly first, with reference to all of these conversations you claim you had with Mr. Keeton you never wrote him a single letter in confirmation of any of those conversations, did you? [131]

A. No.

Q. Why not?

A. I don't think I wrote Mr. Keeton with respect to anything on this estate. Came down to see him or I called him over the phone.

(Testimony of Ralph B. Defenbach.)

Q. I asked why you didn't write him to confirm these various conversations?

A. It wasn't my custom to deal with him that way.

Q. Well, you appreciated your responsibility as the trustee under this agreement that Keeton drew, didn't you?

A. I recited everything to him in person.

Q. Did you at that time meet with the committee on different occasions and then you would go back and tell Keeton what the committee had said to you? A. That is right.

Q. Did you ever ask Keeton to go with you to discuss the matter with the committee?

A. No, I don't think so.

Q. Why not?

A. Didn't think—I don't think that that was my responsibility to ask him.

Q. You felt you were under the guidance of this committee? A. Yes.

Q. In every action you took with reference to funds that [132] came into your hands?

A. Yes.

Q. Now, then, you had certain discussions with members of the Internal Revenue Department, is that correct? A. Yes, sir.

Q. And then you came back and told Keeton what they said to you? A. That is right.

Q. And you never confirmed that by letter?

A. No.

Q. Didn't think that was necessary?

(Testimony of Ralph B. Defenbach.)

A. No.

Q. Do I understand that when you came into the fund arising out of the Omaha insurance policies that you got advice from somebody, Federal Government agency or other, that you could use that fund for administrative purposes?

A. Yes.

Q. And when you say administrative purposes, what do you mean, attorney's fees? A. Yes.

Q. Retainer? A. Yes.

Q. Costs that they might incur in preparing the case for litigation? [133] A. That is right.

Q. Office rent that you might have to pay where these records were impounded down there in Lewiston? You heard his statement in that regard, didn't you? Office rent?

A. That was not connected with this case.

Q. Why, if you felt that you had full authority to use this Omaha insurance — around $8,000 wasn't it? A. Yes, 8,700.

Q. ——for the successful prosecution of this litigation, why was it you didn't tender to Mr Keeton any sum whatsoever to cover expenses that he would incur in coming to Spokane and going back to Lewiston?

A. Because he never submitted any bill.

Q. Never asked for any? A. No, sir.

Q. Now, I am going to put this to you blankly You heard the testimony of Mr. Etter about a conversation at the Ridpath Hotel?

Mr. Etter: And my office.

(Testimony of Ralph B. Defenbach.)

Q. (By Mr. McKevitt): And his office here? You were in court when Mr. Etter testified under oath that such a conversation took place?

A. Uh-huh.

Q. And you say that Mr. Etter is mistaken, at least, he [134] is mistaken when he says that such a conversation took place?

A. I'm sorry to say, but that is correct.

Q. Nothing like it, huh?

A. No, sir. I was not available the night before this hearing was held. I didn't get in here until the late plane.

Q. Well, let's forget about whether it was the night before, let's say at any time immediately preceding the trial? A. Never.

Q. You never had such a conversation with Mr. Etter as he detailed here under oath?

A. I'm sorry, I never did.

Q. Did you have any discussion at all with Mr. Etter at any time or any place prior to the lawsuit about fees? A. No, sir.

Q. And you never received any letter of any kind or character from Mr. Etter prior to the lawsuit about fees? A. No.

Q. Nothing said about a retainer?

A. No, sir.

Q. When did you make the first disbursement out of this [135] $8,000 from the Omaha in any wise touching the expenses of this litigation?

A. Maybe they are on that sheet over there, Mr. Malott. I have sketched them on that agreement.

(Testimony of Ralph B. Defenbach.)

(Document handed to witness.)

March the 14th, 1956, paid Rose McCloud $280.

Q. That was, of course, after you were fully aware of the fact that there had been a judgment entered in your favor as trustee in the amount of some 60,000 and that this check had been made jointly in your name and the name of these attorneys, isn't it? A. Yes, I knew that.

Q. That is the check of the Clerk of this Court dated February 29, 1956 in the sum of $60,302.94?

A. Yes, I was aware of it.

Q. Now, it is a fact it wasn't until after you knew of the existence of that check made jointly payable to you and your attorneys that you first took any interest so far as attorney fees or expenses of this litigation were concerned; that is correct, isn't it?

A. Well, word it differently.

Q. Pardon me?

A. Word it differently. Word it that I didn't make any expenditures.

Q. In other words, is it your position that you wouldn't [136] discuss attorney fees or expenses of this litigation of any kind or character until this lawsuit in this Federal Court here was determined; is that your testimony?

A. My testimony would be that it was agreed between Mr. Keeton and myself that we would wait until the final settlement of this, which he told me would be in the District Court in Nez Perce County,

(Testimony of Ralph B. Defenbach.)

and he was going to petition for a declaratory judgment in Nez Perce County, and at that point——

Q. Mr. Keeton told you he was going to petition Nez Perce, Idaho County Court for a declaratory judgment? A. Yes, sir.

Q. Was that after the entry of this judgment and the payment of this check?

A. He told that to me on or about the 17th of April, 1955.

Q. Oh, 1955? A. Yes.

Q. That was nearly a year before this check was issued?

A. That is right. But that that was his plan, he said, of handling this money.

Q. Declaratory judgment——

The Court: Pardon me, Mr. McKevitt. When was this case started here?

Mr. Etter: After that date. [137]

The Court: Was it afterwards? That was before this case started, at any rate, yes.

A. I don't know what he means by a declaratory judgment.

Q. (By Mr. McKevitt): Put it this way: Mr. Keeton told you sometime before this case was started here in October of 1955 that he was going to institute some kind of an action down in Nez Perce County Court; is that what he told you?

A. That is right.

Q. Did he tell you what type of action it would be?

A. My memory of it is a declaratory judgment.

(Testimony of Ralph B. Defenbach.)

Q. Well, did you ask who the parties to the lawsuit were going to be?

A. He is my attorney, I go by what my attorney tells me.

Q. Well, did he tell you who he was going to make parties plaintiff and defendant in that action?

A. I think probably all—my offhand knowledge of it would be or opinion would be all creditors.

Q. Hadn't anything to do with these insurance companies, then?

A. No. No, I don't think it had anything to do with the insurance companies.

Q. Now, you mentioned a gentleman by the name of Bert Heath, who is Collector of Internal Revenue, is he? A. Yes. [138]

Q. At Boise? A. At Boise.

Q. Is he still there? A. Yes, sir.

Q. Did you contact him at all with reference to coming down here and being a witness in this suit?

A. Yes.

Q. When did you contact him?

A. I wrote him a letter on January the 21st, 1957. I also wrote a letter to Mr. Marion Collister, Assistant United States Attorney in Boise, on the same date, advising him of this case.

Q. Do you mean the case where these gentlemen are suing you? A. Yes, sir.

Q. January of this year you——

A. January.

Q. Did you get a letter back from them?

A. No, sir.

Testimony of Ralph B. Defenbach.)

Q. Have you got the copies of the letters there?

A. Yes, sir.

Q. Let's see them. Are these in evidence here?

A. No.

Q. Now, you also heard Mr. Keeton's sworn estimony on this stand that he was present at the ime of this [139] discussion that Mr. Etter de- ailed to Judge Driver? You heard that testimony?

A. Yes, sir.

Q. Nothing like that took place?

A. I have no knowledge of such a meeting.

Q. So, then, it is your considered testimony here hat these men are either terribly mistaken in their estimony under oath or they are not telling the ruth; is that what you are telling the Court?

Mr. Malott: Just a minute, I think——

The Court: I will sustain the objection to that.

Mr. McKevitt: All right.

Q. If you felt that you could use this $8,000 for dministrative purposes, why did you let your rent f this office down there that you hired for the urpose of impounding these books become in ar- ears for pretty nearly a year?

A. They really had nothing to do with this ction.

Q. When you came up to Spokane for attend- nce at this trial, out of what fund did you pay our expenses? A. My personal funds.

Q. You have never drawn anything against this und in your possession now for your own ex- enses? A. Yes.

(Testimony of Ralph B. Defenbach.)

Q. Have you? [140] A. Yes.

Q. When? A. July the 1st, 1956.

Q. How much? A. I drew $60.48.

Q. For what purpose?

A. For expenses in attending the hearing that was held here on the 18th of October and for a conference with Mr. Harold Coffin on June the 5th of this year.

Q. Did you get authority from this advisory committee to make that expenditure?

A. Yes, sir.

Q. And you came up here to see Mr. Harold Coffin for the purpose of employing him to represent you in this case that these gentlemen had instituted? A. To carry the appeal.

Q. Carry the appeal through? A. Yes.

Q. Have you had any conversation with Mr. Coffin with reference to this case instituted by these gentlemen?

A. Yes. I asked Mr. Coffin if he could represent the trustee in this case and he said he couldn't

Q. He declined to represent you? A. Yes

Q. You discussed with him this question that was involved [141] and what these men were asking, didn't you? A. Yes.

Q. Mr. Defenbach, at all times you felt that any moneys that came into your hands as trustee in your fiduciary capacity, you had to protect the funds to the best of your ability for the benefit of creditors, didn't you? A. That is right.

Q. Now I call your attention to this check dated

(Testimony of Ralph B. Defenbach.)

February 29, 1956. Did you have any discussion with Mr. Etter as to what should be done with that check? You demanded it, didn't you?

A. No, sir.

Q. Didn't Mr. Etter suggest to you, since you and he and Keeton could not agree as to how this fund should be divided, that you should jointly deposit it where this fund could draw interest until this litigation was determined? Didn't Mr. Etter suggest that to you and you refused to do it?

Mr. Malott: Just a moment, just a moment, just a moment, please. I think that is an improper question. It has nothing to do with the merits of the case and the fee.

The Court: Well, I will sustain the objection.

Q. (By Mr. McKevitt): Now, you stated that Mr. Keeton, I believe you said, at the Ridpath Hotel put a proposition up to you that you would guarantee $7,500, win [142] lose or draw, and $15,000 if the lawsuit was won. You said that he put that kind of a proposition up to you?

A. Yes, sir.

Q. Mr. Keeton? A. Yes, sir.

Q. Sometime immediately before the trial in October of last year?

A. In the morning, on the morning of the trial, the morning of the trial, yes.

Q. Was Mr. Etter present at that time?

A. No, sir.

Q. Did Mr. Keeton say that he had discussed such a proposition with Mr. Etter?

(Testimony of Ralph B. Defenbach.)

A. He said what I testified to.

Q. And you said at that time you couldn't entertain any such an offer because you didn't feel you had authority as a trustee to do that, is that correct?

A. That is right, I didn't have my committee there to agree with me.

Q. Well, did you submit that proposition that you say Mr. Keeton made, did you ever submit it to your committee? A. No.

Q. Not at any time? A. No.

Q. Why not? [143]

A. Because Mr. Keeton never submitted it only at that particular time. He never presented it to me in writing.

Q. Did you ask for it in writing?

A. No, sir.

Mr. McKevitt: I think that is all, your Honor.

The Court: Any redirect?

Mr. Malott: I think that is all.

Mr. McKevitt: Need a little rebuttal here.

The Court: Yes, all right.

Mr. Malott: Oh, say, could I add one question?

The Court: Yes, all right. Just a moment.

Mr. Malott: It arises out of my letting a lot of hearsay go in. I am going to ask him one more question.

Redirect Examination

Q. (By Mr. Malott): Mr. Coffin was employed by you to prosecute this appeal?

A. That is right.

(Testimony of Ralph B. Defenbach.)

Q. To represent you on appeal? A. Yes.

Q. And you made a disbursement of how much on that appeal?

A. I gave him an advance of $3,000, $2,500 for the cost of the appeal and $500 to cover expenses.

Q. Was that in full?

A. The $2,500 was in full, yes.

Q. For fee on appeal. Now, the next thing, you mentioned you endeavored to get Mr. Coffin to represent you in this proceeding and Mr. McKevitt asked you if he had turned you down. Why did he refuse representation? Did he tell you why he was refusing to represent you in the fee squabble?

A. He told me that he thought that he needed some of Mr. Etter's files to successfully prosecute the appeal; he didn't feel that he wanted to get into this kind of an action.

Mr. Malott: Very well, that is all.

Recross Examination

Q. (By Mr. McKevitt): How much did you pay that firm altogether now? Was it $3,000?

A. $3,000.

Q. And can you break that down, attorney's fees and expense?

A. $2,500 fees and $500 expenses.

Q. And——

A. They told me that they didn't think the expenses would run $500 and I would be getting a refund one of these days. [145]

Q. And he told you the reason he didn't want

(Testimony of Ralph B. Defenbach.)

to appear in your behalf in this case is because he had used certain files that Mr. Etter had in his office? A. No, he didn't say that.

Q. Well, you know that what he had used was the material that Etter had collected and Keeton in this Court so far as the legal cases were involved; you knew that, didn't you?

A. Yes, I knew that.

Mr. McKevitt: That is all.

The Court: Any other questions of this witness?

Mr. Malott: No further questions.

(Witness excused.)

The Court: All right, Mr. Keeton, then.

PAUL C. KEETON

a petitioner herein, resumed the stand on rebuttal, and testified further as follows:

Direct Examination

Q. (By Mr. McKevitt): Mr. Keeton, you have heard his testimony here? A. I have.

Q. Did you ever have a discussion of any kind, character [146] with this gentleman with reference to instituting any declaratory judgment action in the Nez Perce County Court? A. I did.

Q. When was it?

A. Shortly after Mr. Weyen died, Mr. Defenbach and I had a conversation in which he asked me his status on the $8,000 or the $8,750, and I said probably the only way that it could be figured

(Testimony of Paul C. Keeton.)

out would be to have a declaratory judgment on that in the District Court, which I did.

Q. No such conversation, then, as I understand your testimony, took place after the entry of any judgment in the case up here? A. Never.

Q. Now, with reference to his testimony about a conversation immediately preceding the trial about a flat fee of $7,500, $15,000 if you won, did any conversation like that take place?

A. Absolutely none.

Q. Was there any agreement between you and Mr. Defenbach about waiting until this whole matter was determined before any moneys were disbursed? A. Not on waiting, no.

Q. What was it? [147]

A. I told Mr. Defenbach on many occasions that we had conferences unless the $66,000 case could be won, there wouldn't be anything for anyone and that he couldn't disburse any of those funds, even for his hotel bills or mine, I told him that, on account of these tax liens; unless the $66,000 case was won, it would be better for him to give all the money, the $8,700, or whatever it is, to the government, and that would be the end of it. I had that conversation with him.

Q. You had that conversation.

Q. Can you think of anything further I haven't asked you by way of rebuttal? A. No.

Mr. McKevitt: That is all.

Mr. Malott: No questions.

(Witness excused.)

Mr. McKevitt: We rest, your Honor.

The Court: I have just about reached the limit of my endurance here. I have been on the bench since 10 o'clock this morning, with the exception of one hour at lunchtime, and if you gentlemen want to argue this, I think we better argue it at 1:30 tomorrow afternoon.

Mr. McKevitt: I had suggested to Mr. Malott as far as we were concerned, because of your Honor's knowledge [148] of the case, having tried it below on that phase of it, anyway, that I would be glad to submit the case without argument.

The Court: What is that old saying in the television, "You'll be sorry."

Mr. McKevitt: No.

The Court: Mr. Malott.

Mr. Malott: There are a couple of instances—I am agreeable. What I would like to do, if your Honor please, I would like to get a letter, which I would limit to a page. I will limit to a page letter, one page, that I will get down here before noontime.

The Court: Well, I have no objection to your putting in written memoranda, if you wish.

Mr. McKevitt: I will wait until I get his letter.

The Court: Then you write to me.

Mr. McKevitt: Then you let me send a copy.

The Court: Well, all right. I am not trying to cut you off from oral argument, but really I am not in a position to absorb any more today. I am just about bushed, to resort to a colloquial expression, and if you want to argue, I would have you

rgue tomorrow afternoon. If not, you can submit
letter and counter-letter. How would that be?

Mr. McKevitt: I think what I would like to do [149] at this time on this matter of fees, I would ust like to leave with your Honor this Journal of he American Adjudicature of October and Decem- er, 1956, New York contingent fee schedule. It ay be helpful and——

The Court: Have you seen this thing?

Mr. Malott: No.

The Court: I have heard about it.

Mr. McKevitt: I will leave it with your Honor.

The Court: Very well. Let's see, that is the October-December, 1956 issue, Mr. Malott.

(Which was all of the evidence adduced and proceedings had in the hearing of the above-entitled cause.) [150]

[Endorsed]: Filed March 18, 1957.

RESPONDENT'S EXHIBIT "C"

United States Department of Justice
United States Attorney
District of Idaho

Boise, Idaho, Nov. 16, 1955

Mr. Ralph Deffenbach
Certified Public Accountant
Lewiston, Idaho

Re: U. S. v. R. F. Weyen (deceased) Civil No. 1978-C. Also C-50 and C-52-B.

Dear Mr. Deffenbach:

Last spring I communicated with you in regard to the claim of the United States by reason of a judgment against Mr. Weyen in the sum of $444.20. Since that time I have been advised of two other claims which the United States has against Robert F. Weyen. One is for the sum of $826.28, which arose by reason of the trespass on forest lands and the conversion of forest timber of the value of $826.28. This conversion occurred between July 20, 1953 and August 3, 1953 on Section 11, Township 7 North, Range 44 East, of Umatilla National Forest.

The other claim is a claim of the Internal Revenue Service for the sum of $34,398.62 for withholding and employment taxes from September 30, 1953 through September 30, 1954.

The United States is entitled to priority of payment of these claims by reason of federal statute 31 USC 191. 31 USC 192 makes the assignee fo

Respondent's Exhibit "C"—(Continued)

he benefit of creditors personally liable to the Jnited States if he fails to pay the debts of the Jnited States before paying other creditors.

I realize that the handling of this matter must e very difficult for you and very time consuming ut it is necessary that I know your position in egard to these claims and whether we can expect ayment from the assets assigned to you as trustee or benefit of creditors. I would appreciate receiv- ng this information as soon as you can conven- ently provide it.

Very truly yours,

Sherman F. Furey, Jr.,
United States Attorney,

/s/ By Marion J. Collister,
Assistant U. S. Attorney.

LJC/nr [152]

RESPONDENT'S EXHIBIT "D"

Law Offices of Paul E. Keeton
Lewiston, Idaho

Ir. Ralph B. Defenbach, June 6, 1956
12 Ninth Avenue, Lewiston, Idaho.

e: Sun Life Assurance Co. and Maccabees Ins. Co. vs. Weyen et al.

ear Ralph:

I advised you that I would write you and tell ou that I am in accord with the contents of Mr.

Respondent's Exhibit "D"—(Continued)

Etter's letter dated 1 June 1956. I am especially in accord with his feelings that an offer of $3750.00 for services rendered would not be fair compensation for your attorneys in this matter.

It was impossible for me to appear in the state of Washington as your attorney without joining some attorney in that district as co-counsel. Your attention is called to the rules of the District Court of the United States, for the Eastern District of Washington, and especially Rule 1 (g), as follows:

"(g) Office Address within the State:

Should a party in any cause not appear in person, and should his attorney not maintain an office in this State, there shall be joined of record in such appearance, or within ten (10) days thereafter, an associated attorney having an office in this District and admitted to practice in this court."

If I could have appeared in the state of Washington without joining some person as co-counsel I would have been happy to do so. You never made any suggestions about whom you wished to join as counsel and I never made any requests to you for any suggestions in this matter. I knew from long experience that Mr. Etter specializes in Federal practice and has taken 13 cases to the Circuit Court of Appeals during the last seven or eight years. This would be more than all of the other lawyers in the City of Spokane have taken to the Circuit Court in a similar length of time. Mr. Etter has had wide success in Federal cases and is known throughout the Bar as a very able

Respondent's Exhibit "D"—(Continued)

attorney. I assume that I could have sought less experienced co-counsel or perhaps counsel who would work at very small fees; but it seemed to me that it was important that this case be won in the District Court at Spokane and, of course, we proceeded to handle the case to the best of our ability with the result that some $66,000.00 has now been awarded to you in the Sun Life and in the Maccabees cases. At no time did we ever suggest that you offer any settlement in this case to any of the defendants. I am certain that you have no argument with either Mr. Etter or me concerning the able way in which this case was handled, both at the trial and in the preparation of the briefs on the legal points.

Naturally I am very sorry that it is necessary for me to join with Mr. Etter in withdrawing as attorneys in this matter and in filing a lien on the recovery in both of these cases: again, I am sorry that you would never agree with us that this money should be put out on interest, subject to withdrawal only upon signature by yourself and your two attorneys. Failure to have this money at interest causes a loss of nearly $180.00 per month.

If you wish to have a meeting with your committee, I will be happy to appear before this committee and express my feelings orally. I do not consider that there is anything unethical in lawyers withdrawing if they can not agree with their clients in regard to fees. I hold no animosity toward you or any of the committee in this matter. I feel

Respondent's Exhibit "D"—(Continued)

that it was a mistake on the part of all parties to have entered into this litigation without some understanding in writing regarding the payment of attorney fees. [153]

I was served with a copy of the Appellant's Brief this afternoon, which means that the counsel you retain to continue this matter will have to serve and file their brief within thirty days from the time of service upon us. The rules of the Circuit Court of Appeals provide that in extraordinary circumstances, an extension will be granted; and it might be that your attorney could make a petition, advising the court of the circumstances and get an extension in which to prepare his brief.

When I discussed this matter with you orally, I advised you that I would let you know that I do not make any charges against the creditors' pool, you or the committee, for services rendered heretofore other than those which I claim due me on account of the Sun Life and the Maccabees cases. As far as acting as attorney for the Special Administrator, fees for conferences, letters, telephone, costs, etc., I make no claim, nor will I make one in the future for attorney fees. As far as traveling expenses, phone calls, hotel rooms, meals and incidental expenses while representing you as trustee, you are advised that I make no claim for these except insofar as they pertain to the Sun Life and Maccabees cases and I assume that a full accounting will have to be given to the judge at the time of the hearing on our lien.

Respondent's Exhibit "D"—(Continued)

A copy of the Appellant's Brief is enclosed.

Yours truly,

Paul C. Keeton.

CC:R. Max Etter, Esq.

Original letter and brief mailed to Mr. Harold Coffin, 602 Spokane and Eastern Building, Spokane, Washington, June 7, 1956.

Ralph B. Defenbach.

Copies of letter to H. M. Emerson and Russell S. Randall.

Copy of letter retained in file of Trustee. [154]

RESPONDENT'S EXHIBIT "E"

[Letterhead of Etter and Connelly]

Mr. Paul C. Keeton, Esq. March 26th, 1956
Suite 1 Porter Bldg., Lewiston, Idaho

Re: Sun Life Assurance Co. of Canada, a corporation, plaintiff, v. Weyen, individually, et al., Elfrieda May, etc., U. S. District Court Civil No. 1309, U. S. Court of Appeals for the Ninth Circuit (Undocketed). [Pencil figures: 65,000] The Maccabbees v. Weyen, et al., etc. U. S. District Court Civil No. 1308. [Penciled figures: 5700]

Dear Paul:

I have not had the opportunity to write you about the situation concerning our client, Ralph Defenbach, with respect to the above-entitled cases. I

Respondent's Exhibit "E"—(Continued)

find that it is wholly necessary to do so at this time because appearance has been made in the Court of Appeals for the Ninth Circuit by the attorneys in the cause which will be docketed. Likewise, the matter of preliminary motions must be taken care of in the Maccabbees case, and in all probability there will be some disposition made by pre-trial conference on the basis of ruling of the Court on Motion for Summary Judgment.

I mention these things to you because it seems apparent from Mr. Defenbach's position that he has some implied authority somewhere to employ attorneys, but apparently no authority to pay them. I want you to advise Mr. Defenbach that I cannot continue to act as an attorney in this cause any longer under this type of an arrangement. I have not done so in all the years of my practice, and can see no compelling reason to do so now. I have argued, I think in all, about fifteen cases in the Court of Appeals at San Francisco, and I have emphasized Federal Practice and Procedure in my practice. I consequently feel that I have some qualifications with respect to federal practice and I certainly do not intend to proceed with all of the work and hazards of this appeal, and probably a further one after litigation, in the Maccabbees case, as the situation presently stands. [155]

Mr. Defenbach's apparent feeling that some fee basis should be entertained on the basis of the award to the plaintiff is an appalling misunderstanding of the position of the litigants in this case

Respondent's Exhibit "E"—(Continued)

Mr. Greenough, the attorney for plaintiffs merely handed the money to the Clerk and told the defendants to figure out the law if they wanted any of it. By virtue of trial and a tremendous time spent in research, we came up with the cases, particularly the leading case in Washington, which sustained an otherwise not too solid position and recovered the large judgment. Now it seems that this whole matter of payment to the attorneys must remain in some kind of a "limbo" the end result of which none can foresee, but with the apparent feeling that the attorneys will continue all of the litigation with no understanding at all as to any compensation from any source.

On that basis, I wish you would advise Mr. Defenbach that I cannot continue as counsel, and unless immediate steps are taken to the solution of this problem I am withdrawing as counsel in all of these cases and demanding full compensation at this time.

It is inconceivable to me that a definite arrangement cannot be made for the deposit of these funds in an interest-bearing institution where the funds could earn $2,000.00 or more before the case is finally processed and disposed of in the Appellate Court, and I think that Mr. Defenbach should consult his committee, or, failing that, his committee should be advised that this is a completely indefensible and foolish position which he takes. It was my understanding that in as much as this case

Respondent's Exhibit "E"—(Continued)

was taken on a contingent basis that 20% of the recovery was not excessive and was, in fact, an agreeable amount, keeping in mind that its payment out of moneys now recovered still leaves the Trustee with a lot more money than he would have had had a settlement been reached in the case in accord with discussions had with the other litigants. That being so, I am insistent that as to my share of the fees that I be paid one-half of the 20% now recovered, or the approximate amount of $6,000 some odd dollars—and that only if there is agreement that we continue further with these cases. If it is not agreeable that I continue further in accord with my proposal, then I shall expect to be paid $7500.00 for the work which has been done in addition to the trial work in the main cause. Furthermore, in addition to the payment of the percentum of recovery which I have demanded, I am insisting that agreement [156] be made for the payment of 30% of the recovery in the event favorable disposition is made on appeal. I feel that I can assume my own responsibilities in the event disposition is not favorable. Furthermore, as attorneys, it is absolutely necessary that we get this fund into a bank and earning money. Mr. Defenbach should be so advised.

I will expect a prompt reply.

Very sincerely yours,

/s/ R. Max Etter.

RME:S [157]

Respondent's Exhibit "E"—(Continued)
[Letterhead of Paul C. Keeton]

Mr. Ralph B. Defenbach 11 April 1956
712 Ninth Avenue, Lewiston, Idaho

Re: Sun Life Assurance Co. vs. Weyen et al. Maccabees Insurance Co. vs. Weyen et al.

Dear Ralph:

Max Etter wrote me a letter several days ago, a copy of which is enclosed; but I have not had an opportunity to discuss it with you. Today he called me on the telephone and told me that tomorrow he is going to go into court in the Maccabees case and move for a summary judgment, which he expects the Court to grant on account of the ruling established in the earlier case. He also told me that he does not feel that he should go any further into the appeals on these cases without a definite understanding regarding fees and he wanted me to discuss his letter with you. I am going to be in Moscow trying a case before the Federal Court for the next several days, so you can be thinking this matter over and I will be happy to discuss it with you.

We expect that if summary judgment is granted in the Maccabees case, Rowan and associates will also take an appeal in this matter, requesting that it be joined with the other case, making a decision in the first case binding in both matters before the Circuit Court of Appeals.

Yours truly,

/s/ Paul C. Keeton.

K:b—Encl: 1 [158]

Respondent's Exhibit "E"—(Continued)
[Letterhead of Etter and Connelly]

(Copy) April 13th, 1956

Mr. Paul C. Keeton, Attorney at Law
Suite 1, Porter Block, Lewiston, Idaho

Re: Sun Life Assurance Co. v. Weyen et al. Maccabees Insurance Co. vs. Weyen, et al.

Dear Paul:

I am in receipt of copy of letter which you wrote to Mr. Ralph B. Defenbach on April 11, 1956.

In considering this matter I must concede some degree of reason for Mr. Defenbach's position, in that he is charged with a responsibility as Trustee. Consequently, I would assume that he could not have objection to the payment of fees if he is protected to the extent of any personal obligation that he may have to account for such fees in the event of an unexpected reversal by the Court of Appeals. However, by the same token, I fail to see that he would have any justification for refusal to pay fees if he is personally protected against any loss as a result thereof.

Consequently, I propose that in the event he will pay my fees on the present basis which I wrote about, I shall, and do hereby, agree to hold Mr. Defenbach harmless against the probability or actuality of him having to make good any part of the fees paid to me with the following exception. It was my understanding that in any event we were to be paid a flat fee for this litigation—that is, the first Sun Life cases and the Maccabees case. I think

Respondent's Exhibit "E"—(Continued)

that the flat guarantee to which we should be entitled for these cases, and the appeal, should be $3750.00, plus costs and expenses in the event of ultimate loss. Therefore, if Mr. Defenbach will pay me now, in accord with my letter to you, I would, as I have said, hold him harmless for any personal responsibility for any of the sums paid me as fees, minus, however, one-half of the agreed fee which I understand will be paid—win, lose or draw. As you well know, I am fully and completely responsible financially in the amount of the fee which is involved, and am financially responsible far above any exemptions that would attach to me or to the community constituting my family. [159]

Now that I have made this guarantee, so far as Mr. Defenbach is concerned, I fail to see why there should be any further difficulty involved in effecting an amicable handling of this entire matter, assuming that agreement can be made with us on the ultimate disposition of a percentage for all of our work in this case if we are successful in San Francisco in the Appellate Court.

I will, therefore, ask for prompt disposition of the matter in accord with this letter.

Very sincerely yours,

/s/ R. Max Etter.

RME:S

Signed copy to: Mr. Ralph B. Defenbach, 712 Ninth Avenue, Lewiston, Idaho. [160]

Respondent's Exhibit "E"—(Continued)

[Letterhead of Etter and Connelly]

Mr. Ralph B. Defenbach June 1st, 1956
712 Ninth Avenue, Lewiston, Idaho

Dear Mr. Defenbach:

I refer to my letters of March 26th, 1956 and April 13th, 1956, and also to my conversation with Mr. Paul Keeton on the 31st day of May here in Spokane.

Mr. Keeton advises that you, after consultation with your committee, have proposed the payment of fees for services rendered in this case in the amount of $3,750.00. Without any further discussion, I advise you that your proposal is rejected.

From the commencement of this action there was unwillingness on your part to assume any risk in this litigation by paying an agreed and substantial fee for the prosecution of the claims of the creditors. You were wholly content to let the attorneys take the risk involved, and I do not doubt but that had the attorneys lost the action they would have had to take vigorous steps in order to recover any fees from you. On the other hand, you did not reject the idea or proposal of a contingent fee based upon the necessity of the attorneys making some recovery. Now, of course, substantial recovery has been made, and I do not know of a Court in the land that would not consider a fee of 20% on contingency as a reasonable fee under the circumstances. Likewise, I do not believe that any Court would hold that a fee of 30% for the handling of

Respondent's Exhibit "E"—(Continued)

appeal in the Court of Appeals would be other than reasonable, keeping in mind that these fees apply for not only handling the Sun Life case, but likewise the Maccabees.

We have recovered approximately $65,000.00 to $66,000.00 and on the basis of a conservative contingent arrangement such as I have outlined, we would be entitled to some $13,000.00 for our recovery thus far, and some $19,000.00 or $20,000.00 in the event the verdict is sustained on appeal. You, however, have refused, until the other day, to make known your position and have now adopted an attitude that you will pay only a sum equal to less than 6% of the amount recovered, even though we have taken all the risk in handling it on a contingent basis. [161]

Nevertheless, if this matter can be settled, I desire to settle it now.

I propose that if you desire to settle this matter, you immediately pay me as and for the services of both counsel the sum of $8,250. If you desire that we continue this appeal to its conclusion in the Court of Appeals on a paid fee basis, then it is my proposal that the sum of $4,250.00 additional be paid, plus costs and expenses involved. If you desire to pay $8,250.00 at this time for work already performed and desire that the appeal be handled on a contingency basis, then I propose that if the appeal is won the attorneys receive $6,000.00 additional.

If you do not desire to pay any fees, but desire that this whole matter be taken on a contingency,

Respondent's Exhibit "E"—(Continued)

no further proceedings will be taken until an agreement is entered providing for payment of 30% of the recovery made in the cause.

I am advised by the Circuit Court that the Brief of the opposition is due on the 14th day of June, and that thereafter we must write and file our Brief within thirty days. If you are not going to reach any agreement, then I am going to withdraw from this case, and I am authorized to advise that Mr. Keeton will withdraw also. In that event, I shall serve and file a lien for attorney's fees with the Clerk of the Federal District Court which lien shall run against the check now in my possession and all of the other papers and records in this case. In that event it will be up to you to hire yourselves lawyers for the purpose of finishing this appeal and likewise for the purpose of contesting a proper and adequate award to us in accord with services performed.

Because the time is short, and because I desire to give notice before I incur any more work or obligation in writing the Brief, I am going to insist that your answer be in my hands not later than Thursday, June 7th, 1956. In the event I do not receive it I shall promptly give notification of my withdrawal and shall serve you with a lien for services.

Very truly yours,

/s/ R. Max Etter.

RME:S

cc: Mr. Paul Keeton, Porter Building, Lewiston, Idaho. [162]

Title of District Court and Causes Nos. 1308-1309]

STATEMENT OF POINTS

To the above entitled Court and to Stanley D. Taylor, Clerk thereof, and to R. Max Etter and Paul C. Keeton and Francis J. McKevitt, your attorney:

You Are Hereby Notified that the following is a statement of points upon which the appellant, Ralph B. Defenbach, as trustee, will rely on his appeal to the Court of Appeals for the Ninth Circuit:

1. Fifteen thousand dollars ($15,000.00) is excessive compensation for the services of petitioning attorneys in these proceedings.

2. The trial court erred in finding that $15,000.00 was reasonable compensation for such services.

3. The trial court erred in entering judgment for $15,000.00 as compensation for such services.

Dated this 9th day of April, 1957.

/s/ THOMAS MALOTT,
Attorney for Defendant. [163]

Acknowledgment of Service Attached.

[Endorsed]: Filed April 9, 1957.

[Title of District Court and Causes Nos. 1308-1309]

CERTIFICATE OF CLERK

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify the attached pages numbered from 1 to 157 inclusive to be a full, true, and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal therein in the United States Court of Appeals as called for by Defendant-Appellant's Designation of Record on Appeal, as the same are on file and of record in the office of the Clerk of said District Court, to-wit:

Stipulation, filed April 27, 1956.

Order, filed May 2, 1956.

Notice of Lien, filed June 20, 1956.

Notice of Lien, filed June 20, 1956.

Findings of Fact and Conclusions of Law, filed December 30, 1955.

Judgment, filed December 30, 1955.

Petition, filed January 22, 1957.

Answer to Petition, filed January 31, 1957.

Findings of Fact and Conclusions of Law, filed February 8, 1957.

Judgment, filed February 8, 1957.

Notice of Appeal, filed March 8, 1957.

Cost Bond on Appeal, filed March 8, 1957.

Reporter's Transcript of Proceedings at the

Hearing, filed March 18, 1957.
Respondent's Exhibit C.
Respondent's Exhibit D.
Respondent's Exhibit E.
Statement of Points.
Designation of Record on Appeal.

I further certify that said record and exhibits constitute the record on appeal from the Judgment of the United States District Court to the United States Court of Appeals for the Ninth Circuit at San Francisco, California.

I further certify that no charge has been made for the preparation of this record on appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Spokane in said District this 12th day of April, 1957.

[Seal] /s/ STANLEY D. TAYLOR,
Clerk of said District Court.

[Endorsed]: No. 15515. United States Court of Appeals for the Ninth Circuit. Ralph B. Defenbach, as Trustee, Appellant, vs. R. Max Etter and Paul C. Keeton, Appellees. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed: April 15, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15515

RALPH B. DEFENBACH, as Trustee,
Appellant.

vs.

R. MAX ETTER and PAUL C. KEETON,
Appellees,

DESIGNATION OF PRINTED RECORD

To the above entitled Court and to Paul P. O'Brien, Clerk thereof, and to R. Max Etter and Paul C. Keeton and Francis J. McKevitt, your attorney:

You, and Each of You, are hereby notified that the appellant, Ralph B. Defenbach, as Trustee, upon the filing of the Statement of Points on which he intends to rely on appeal, does hereby file and designate all of the record which is material to the consideration of the appeal and which shall be printed as the record on such appeal, to-wit:

Stipulation in cause No. 1308, filed April 27, 1956.

Order in cause No. 1308, filed May 2, 1956.

Two notices of lien filed in causes Nos. 1308 and 1309, June 20, 1956,

and the following records and proceedings filed in cause No. 1309:

Findings of Fact and Conclusions of Law, filed December 30, 1955.

Judgment, filed December 30, 1955.

Petition of Etter and Keeton, filed June 22, 1956.

Answer of Ralph B. Defenbach, as Trustee, filed January 31, 1957.

Findings of Fact and Conclusions of Law, filed February 8, 1957.

Judgment, filed February 8, 1957.

Notice of Appeal, filed March 8, 1957.

Transcript of Evidence, filed with the District Court March 18, 1957.

Exhibits "C", "D" and "E" adduced at the hearing in this proceeding on January 31, 1957.

Statement of Points on Appeal filed with the District Court April 9, 1957.

Designation of Record filed with the District Court April 9, 1957.

This designation.

Dated this 12th day of April, 1957.

/s/ THOMAS MALOTT,
Attorney for Appellant,
Defenbach.

Acknowledgment of Service Attached.

[Endorsed]: Filed April 15, 1957. Paul P. O'Brien, Clerk.